88-1095

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH HOWE and DORIS LOUISE HOWE,

Appellants,

vs.

NORCHEK OF NEWPORT, INC.
d/b/a WOODY'S WHARF; ROBERT KINNEY,

Appellees.

APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether California Business & Professions Code Sections 25602 and 25602.1 violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by allowing to a criminal minor a cause of action against a licensed provider of alcohol while denying such a cause of action to an innocent minor.

2. Whether California Business & Professions Code Section 25602(b) violates the equal protection clause of the Constitution of the United States by providing to one class of citizens, namely licensed providers of alcohol, a civil immunity for their criminal acts.

3. Whether California Business & Professions Code Section 25602(c) and Civil Code Section 1714(b) violate the

due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution by establishing an irrebuttable presumption that the service of alcohol cannot cause injury to a third party even though the presumption is not universally true and the state has reasonable alternative means of making an individualized determination of causation.*

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* Appellants, the Honorable Joseph Howe and Doris Louise Howe, are Arizona residents and were plaintiffs in the trial court and appellants in the Court of Appeal. Appellees Norchek of Newport, Inc. d/b/a Woody's Wharf ("Norcheck") and Robert Kinney are California residents and were defendants in the trial court and appellees in the Court of Appeal. The City of Newport of Beach and State of California were defendants in the trial court but were not involved in the appeal below.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. _____

JOSEPH HOWE and DORIS LOUISE HOWE,
Appellants,

v.

NORCHEK OF NEWPORT, INC. d/b/a WOODY'S WHARF; ROBERT KINNEY,
Appellees.

ON APPEAL FROM THE COURT OF APPEAL
OF
CALIFORNIA

JURISDICTIONAL STATEMENT

Appellants, the Honorable Joseph Howe and Doris Louise Howe, appeal from the final judgment of the Court of

Appeal of California, dated July 5, 1988, holding that California Business & Professions Code Sections 25602 and 25602.1 and California Civil Code Section 1714(b), as applied in this case, do not violate appellants' rights to equal protection and due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

OPINIONS BELOW

The opinion of the Court of Appeal of California is not officially reported; it appears as Appendix A hereto. The order of the Superior Court from which the appeal was taken appears as Appendix B. The order of the Supreme Court of California denying appellants' petition for review appears as Appendix C.

JURISDICTION

The California Court of Appeal on July 5, 1988 filed its opinion upholding the constitutionality of the challenged statutes against appellants' claims that these statutes violated their rights under the Fifth and Fourteenth Amendments. On September 21, 1988, the Supreme Court of California denied appellants' petition for review. On November 30, 1988 appellants filed a notice of appeal in the Court of Appeal of California, a copy of which appears as Appendix D.

This appeal is being docketed in this Court within ninety days from the denial of appellants' petition for review. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth and Fourteenth Amendments of the United States Constitution; California Business & Professions Code §§25602 and 25602.1; and California Civil Code §1714(b). These constitutional and statutory provisions are set forth in Appendix E.

HOW THE FEDERAL QUESTION WAS RAISED

At the earliest stage of the proceedings below, in opposition to appellees' demurrers to appellants' complaint and first amended complaint, appellants raised the claim that California Business & Professions Code §25602(b) violated the equal protection clause because it discriminated against victims of crimes and did not protect all minors equally.

At the same time, appellants argued that Business & Professions Code §25602(c) and California Civil Code Section 1714(b) violated the due process clauses of the Fifth and Fourteenth Amendments because they impermissibly created an irrebuttable presumption on the issue of causation. Appellees' demurrer to the first amended complaint was sustained without leave to amend. [Appendix B.]

Appellants restated their claims under the Fifth and Fourteenth Amendments before the Court of Appeal which considered and rejected the constitutional claims. [Appendix A, pp. A-23 to A-27.]

STATEMENT OF THE CASE

At the time of his death, appellants' son, Joseph Bradford Howe

("Joey"), was twenty years old, in good health and regularly employed. Appellee Norchek was engaged in the business of selling alcohol to the general public at Woody's Wharf, a Newport Beach bar. Appellee Kinney was a bartender at Woody's Wharf.

During the evening of March 10, 1985, appellees served substantial quantities of alcoholic beverages to Steven Chase, who, at the time, was already very, very drunk. Immediately prior to being served by appellees, Chase had been refused service at two other bars and ejected from a third.

Appellees knew that Chase was obviously intoxicated because, among other things, Kinney saw Chase fall off his barstool. Appellees continued serving Chase. Each appellee knew that

Chase was so drunk that he was not in responsible command of his own conduct. Appellees also knew that Chase would leave by motor vehicle. Despite such knowledge, appellees continued to serve cocktails to Chase in order to get money from Chase.

Soon after leaving Woody's Wharf, the pick-up truck driven by Chase collided with and killed Joey, who was riding his bicycle home from work. At the time Chase killed Joey, Chase's blood alcohol level was in excess of .30%.[1] Chase was so drunk that he did

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[1] A blood alcohol level of .30% is three times the legal limit. The California Supreme Court has noted that at blood levels in excess of .20% a casual observer will be able to detect signs that the person is drunk, and if a person's blood alcohol level is between .30% and .40%, the person will begin to become comatose. [See Ewing v. Cloverleaf Bowl, 20 Cal.3d 389, 398, 143 Cal.Rptr. 13 (1978).]

not realize at the time of impact that he had hit a person even though his windshield was smashed.

Chase left the scene and was arrested three hours later and has pleaded guilty to felony charges arising out of the accident. At the time appellants' filed their first amended complaint, appellee Kinney was being criminally prosecuted for violating California Business & Professions Code §25602(a) which prohibits service of alcohol to an obviously intoxicated person.

Appellees continued to serve Chase for their own pecuniary gain in conscious disregard of the risk to Joey and other people on the highways. Joey was killed as a direct and

proximate result of appellees' criminal misconduct.

THE QUESTION IS SUBSTANTIAL

In 1978, the California legislature amended California Business & Professions Code §25602 and Civil Code §1714(b) to immunize people who serve alcohol to others who are "obviously intoxicated." The legislature also created a statutory exception in Business & Professions Code §25602.1, allowing claims against a licensed alcohol provider who serves an obviously intoxicated minor ("the 1978 Amendments").[2] Ironically, if Joey had been as intoxicated as Chase, had consumed so much alcohol at Woody's

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[2] Under California law, a minor for purposes of alcoholic beverage control is anyone under 21 years of age. [California Constitution, Article XX, Section 22(d).]

Wharf that he was almost comatose, had left appellees' bar on his bicycle, and had swerved onto the highway into the path of an innocent driver, then Joey could have successfully sued appellees under the 1978 Amendments. [See Chalup v. Aspen Mine Co., 175 Cal.App.3d 973 (1985).]

Because Chase was over twenty-one, however, appellees have no civil liability under the 1978 Amendments for their criminal acts which led to Joey's death. As we will show below, the 1978 Amendments deny equal protection to appellants and others similarly situated because the legislation discriminates against innocent minors and against victims of crime.

The 1978 Amendments also presume conclusively that the consumption of

alcohol, rather than the service of alcohol, is the proximate cause of any subsequent injury. This irrebuttable presumption denies to appellants their due process rights to an individualized determination on the issue of causation.

Drunk driving is a menace in this country, a sizeable and deadly menace. Imposing economic liability upon the server of alcohol is an effective means of preventing drunk-driving and its resulting carnage. A majority of states have laws regulating server liability. The issues raised in this appeal are not "academic or episodic" and have implications well beyond the effect on the immediate parties. Appellants request that this Court note probable jurisdiction and set the case

for plenary consideration or, alternatively, reverse the opinion below.

THE 1978 AMENDMENTS DISCRIMINATE AGAINST INNOCENT MINORS

The Fourteenth Amendment mandates that no state may "deny to any person within its jurisdiction the equal protection of the laws" and requires that "all persons similarly circumstanced shall be treated alike." [Reed v. Reed, 404 U.S. 71, 75-76, 30 L.Ed. 225, 229, 92 S.Ct. 251 (1971).]

Tests to determine the sufficiency of state statutes under the equal protection clause have been variously expressed. At a minimum, a statutory classification must bear some rational relationship to a legitimate state purpose. [Weber v. Aetna Casualty and

Surety Company, 406 U.S. 164, 172, 31 L.Ed.2d 768, 92 S.Ct. 1400 (1972).] A statute is unconstitutional where it creates different classes of citizens without any rational basis for the classifications. [Reed v. Reed, supra, 404 U.S. at 76.][3] The 1978 Amendments classify minors arbitrarily to promote the ends of a powerful special interest lobby, the liquor supply industry.

The Court of Appeal acknowledges that the 1978 Amendments creates two classes of minors and that ". . .minors injured through their own intoxication

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[3] Appellants contend that because the 1978 Amendments affect a fundamental personal right, the right to life, the highest level of scrutiny is required. [See Weber v. Aetna Casualty and Surety Co., supra, 406 U.S. at 172, 173 (1972).] For purposes of this jurisdictional statement, however, appellants will demonstrate that the 1978 Amendments cannot pass even a minimum level of examination.

may bring civil suit . . . but young people harmed through no fault of their own may not." [Appendix A at p. A-24.] The Court of Appeal in conclusory fashion approves the constitutionality of this distinction on the basis of Cory v. Shierloh, 29 Cal.3d 430, 174 Cal.Rptr. 500 (1981). Cory however, is distinguishable.

Cory addressed the question of whether minors are entitled to greater protection than adults. The answer, according to Cory, was yes. [Cory v. Shierloh, supra, 29 Cal.3d at 440.] The issue here, however, is whether a minor that has violated liquor laws is entitled to greater protection than an innocent minor. Cory did not decide this issue.

Innocent minors deserve equal or greater protection than criminal minors. The Court of Appeal decision, however, has the opposite effect. A comparison of this case to Chalup v. Aspen Mine Co., supra, shows how the 1978 Amendments protect under-age drinkers while leaving innocent children without a remedy.

The plaintiff in Chalup, an 18-year old, went to a bar and drank between five and seven vodka gimlets. Upon leaving, she ran across the street against the traffic signal and into the path of a car, sustaining injuries. The California Court of Appeal narrowly construed Business & Professions Code §25602.1 and concluded that the plaintiff could state a cause of

action against the bar for serving an obviously intoxicated minor.

The following hypothetical situation illustrates the absurdity of the distinctions created by the 1978 Amendments. A person, on the day before his twenty-first birthday, enters a bar and illegally drinks past the point where he is "obviously intoxicated." If the person then leaves the bar, stumbles off the curb, and injures himself, that person may sue the bar. The next day, the same person could enter the same bar and drink the same quantity of alcohol. If the person left the bar, started driving and struck a three year old child playing in her front yard, the child would not have a cause of action against the bar even if, as a result of

the accident, she were rendered a quadriplegic with brain damage.

One wonders what public interests are served by this classification scheme. In evaluating or defining the "rational basis" for a statute, the court should look at the actual legislative purposes of an act and not strain to invent an unrealistic or tenuous state purpose.

The distinctions between innocent and criminal minors become even more nonsensical upon examination of the theoretical reasons for the 1978 Amendments. The purported bases for not protecting all minors equally and for discriminating against innocent minors are not rational by any standards.

The real reason for the 1978 Amendments is to grant economic preference to a powerful special interest group, the liquor lobby.

One governmental interest purportedly promoted under Business & Professions Code §25602.1, according to the Chalup and Cory courts, is the protection of people under twenty-one. [Chalup v. Aspen Mine Co., supra, 175 Cal.App.3d at 978; Cory v. Shierloh, supra.] As a minor, Joey Howe was in the class of people to be protected by Business & Professions Code §25602.1. Yet Joey's fundamental right to life does not receive the same protection afforded to a drunken 18-year old.

Another alleged basis for the immunity involves "fairness" to the server of alcohol and his insurer.

[Cory v. Shierloh, supra, 29 Cal.3d at 439, 440.] The fallacy underlying the "fairness" rationale is that where a bar serves a drunk who has lost his judgment, the server's criminal misconduct is a wrongful act, independent of the drunk's misconduct. An analogous situation occurs where a person entrusts an automobile to an obviously intoxicated person. The drunk driver's subsequent misconduct does not relieve the entrustor of liability for creating the hazard when he gave the car keys to the drunk. [Blake v. Moore, 162 Cal.App.3d 700, 702, 208 Cal.Rptr. 703 (1984).] If a party can be held liable for giving car keys to a drunk, a bar can be held liable, with equal fairness, for

serving liquor to a drunk with car keys.

The "unfair" burden to the bars' insurers involves the payment of claims to injured third parties. Claims payments should not be an economic burden, though, because the carriers have supposedly collected premiums to pay these claims. Moreover, criminal acts are not insurable under California law [see California Insurance Code Section 533]. The true effect of the 1978 Amendments is to grant a windfall to carriers that have collected premiums but no longer have any exposure to the victims of their insureds' crimes.

Even if civil liability were "unfair", protection of insurance companies through the elimination of a

class of actions is not a legitimate state purpose. The California Supreme Court in Brown v. Merlo noted that "it is unreasonable to eliminate causes of action of an entire class of persons simply because some undefined portion of the designated class may file fraudulent lawsuits." [Brown v. Merlo, 8 Cal.3d 855, 875, 106 Cal.Rptr 388 (1973).] The evil of this kind of legislation is that it is over inclusive and imposes a truly unfair burden on innocent individuals. A third theoretical basis for the 1978 Amendments is to reduce "the frequency of alcohol-caused injuries." [Cory v. Shierloh, supra, 29 Cal.3d at 440.] The theory, according to Cory, is that a drunk with exclusive liability will experience "some heightened sense of

responsibility" and drive more carefully. [Id.] This analysis is flawed. No driver, sober or obviously intoxicated, intends to have an accident and therefore goes through the kind of sophisticated mental analysis postulated by the Supreme Court in Cory.

The folly of this "safety basis" is highlighted by reference to Business & Professions Code §25602(a). The state prohibits service of liquor to an obviously intoxicated person in order to limit the amount of alcohol served and to reduce the number of alcohol-related injuries. The lucid bartender, not the sloppy drunk, has the statutory duty to say "when."

Where a civil immunity is granted to the commercial provider of alcohol,

there is little economic incentive to stop serving liquor and, if insurance rates are lowered, the cost of serving liquor is reduced. Thus, the effect of the immunity provided by Business & Professions Code §25602(b) is to increase the amount of alcohol served and therefore increase, rather than decrease, the number of alcohol-related injuries.

The real reason for the 1978 Amendments is reflected in the identity of the author of their legislative history, namely the United Spirits Association. When this legislation was passed, the victims of discrimination, those unknown and voiceless future victims, were in no position to oppose the powerful special interest group that pushed through this ridiculous

piece of legislation. This basis for the legislation, while real, is in no way rational. Appellants' only hope for justice lies with this court. The Court of Appeal decision should be reversed or this case set for plenary hearing.

BUSINESS & PROFESSIONS CODE §25602(b) DISCRIMINATES AGAINST VICTIMS OF CRIME

It is a crime to serve alcohol to an obviously intoxicated person. [Business & Professions Code §25602(a).] Business & Professions Code §25602(b), which grants an immunity to people who violate §25602(a), represents an institutionalized preference for the rights of criminals over the rights of the victim.

One of the remedies available to the victim of a crime is the right to file a civil suit for damages against the criminal. Where the crime involves a bartender or bar serving an obviously intoxicated patron, however, Business & Professions Code §25602(b) takes away the victim's right to sue. The criminal, not the victim, is protected by the state.

The law has long recognized that "no one should suffer by the act of another" [California Civil Code §3520] and that "for every wrong there is a remedy." [California Civil Code §3523.]

That the rights of innocent victims deserve greater protection than the rights of those who inflict the injury is an undisputed ethic in this country.

Every victim should have the right to sue the criminal that caused his injury. The 1978 Amendments grant an economic preference -- immunity -- to one group of citizens at the expense of another. This is constitutionally prohibited.

When the wrongful act is also a crime, the existence of a civil remedy is especially important since it can act as an additional means of law enforcement. As the dissent noted in Kindt v. Kauffman, 57 Cal.App.3d 845, 873 (1976):

> "Available law enforcement and Alcoholic Beverage Control personnel can supply only sporadic policing at best. Sustained, effective control of these myriad establishments

through criminal and licensing sanctions is virtually impossible. An absentee tavern keeper may reap profit from his bartender's chronic disregard of the statute, [Section 25602], shielding himself from criminal liability by claims of ignorance and non-participation. As a criminal and licensing sanction, Section 25602 is ineffectual to stem the tide of drink-caused traffic carnage. In a civil damage action, the tavern operator's responsibility for the bartender's breach would stimulate the operator to energetic policing of his own establishment. Damage eligibility, extended to all

within the protective scope of Section 25602, would supply a silent, steadfast deterrent to the statute's violation."

The legislature has recognized that the bar and bartender who serve an "obviously intoxicated person" create risks of injury to the general public. Thus, the law proscribes this conduct. Any criminal sanction, however, is only as good as its enforcement. The 1978 Amendments are unreasonable because they discourage rather than promote compliance with criminal statutes.

The purported bases for the 1978 Amendments, discussed above, are even more irrational in the context of victim's rights. As claimed in Cory, the 1978 Amendments supposedly promote highway safety and fairness to the

bartender and its insurance carrier. No one truly believes that the law should be more fair to the criminal than it is to the criminal's victim.

The broad immunity of the 1978 Amendments unfairly shifts the economic burden of the uninsured drunk driver to the innocent victim rather than place it on the tortfeasor-bartender (or bar). Where two criminals act independently or concurrently, ". . . the innocent wronged party should not be deprived of his right to redress" even though apportionment of the injury may be difficult or incapable of proof. [See Summers v. Tice, 33 Cal.2d 80, 88 (1948).] "The wrongdoers should be left to work out between themselves any apportionment." [Ibid.] Indeed the rule of joint and

several liability exists so that an injured party may "obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability." [American Motorcycle Association v. Superior Court, 20 Cal.3d 578, 590 (1978).]

There is a strong public policy interest to "assure 'monetary protection to that ever-changing and tragically large group of persons who . . . suffer grave injury through the negligent use of the highways by others.'" [Jess v. Herrmann, 26 Cal.3d 131, 138-39 (1979).] California and many other states have financial responsibility laws requiring drivers to have insurance. Despite these efforts, those who drink and drive,

especially those who are repeat offenders, are not likely to have insurance and are not likely to be financially responsible for the consequences of their destruction.

Business & Professions Code §25602(b) confers a benefit on bar owners and bartenders which is not granted on the same terms to all citizens -- the ability to avoid the civil consequences of one's criminal misconduct. The cost of this benefit is borne by innocent victims like appellants and Joey.

THE COURT OF APPEAL DECISION DENIES TO PETITIONERS THEIR DUE PROCESS RIGHT TO AN INDIVIDUALIZED DETERMINATION ON THE ISSUE OF CAUSATION

Business & Professions Code Section 25602(c) and Civil Code Section

1714(b)[4], which are part of the 1978 Amendments, conclusively presume that service of alcohol cannot cause subsequent injuries to third parties. A conclusive presumption violates due process guarantees "when that presumption is not reasonably or universally true in fact, and when the state has reasonable alternative means of making the crucial determination." [Vlandis v. Kline, 412 U.S. 441, 452, 37 L.Ed.2d 71, 93 S.Ct. 2230 (1973); see also, In Re Lisa R., 13 Cal.3d 636, 651 (1975); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 86 L.Ed.2d 487,

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[4] These statutes reflect a legislative declaration that "the holdings in such cases as Vesely v. Sager (5 Cal.3d 153), Bernhard v. Harrah's Club (16 Cal.3d 313) and Coulter v. Superior Court (21 Cal.3d 144)" are abrogated. These statutes are referred to hereinafter as the "anti-Vesely statutes".

105 S.Ct. 2862 (1985).] The rule against irrebuttable presumptions is based on a constitutional belief that a party's fundamental right to be heard outweighs the state's interest in administrative ease and convenience. [Vlandis v. Kline, supra, 412 U.S. at 451-452.]

The presumed fact in the 1978 Amendments, that service of alcohol cannot cause injuries, is not universally true. The legislature recognizes in Business & Professions Code §25602.1 that service of liquor to an obviously intoxicated minor can cause injuries. In Cantor v. Anderson, 126 Cal.App.3d 124 (1981), at least one California court has recognized that service of liquor to someone with an

exceptional physical or mental condition can cause injuries.[5]

The causal connection between service of alcohol and subsequent injury has been recognized in California by both the legislature and the judiciary. The anti-Vesely statutes fail the first prong of the Vlandis test.

The anti-Vesely statutes fail the second prong, as well, because the state has a reasonable alternative means of determining causation -- civil litigation. Civil litigation is used to determine causation under Business & Professions Code §25602.1 and in Cantor actions. Civil litigation is used to determine

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[5] The Cantor exception was cited with approval by the California Supreme Court in Strang v. Cabrol, 37 Cal.3d 720, 726, 209 Cal.Rptr. 347 (1984).

causation in many situations where there is more than one concurrent cause. For example, a landowner may be held liable for the criminal acts of third parties where the criminal acts are reasonably foreseeable. [Issacs v. Huntington Memorial Hospital, 38 Cal.3d 112, 211 Cal.Rptr. 356 (1985).] More significantly, a party may be held liable to third parties for negligent entrusting an automobile to an obviously intoxicated person. [Blake v. Moore, supra.]

The legislative fiat of "no causation" is an improper encroachment on the fact finding role of the jury. Civil litigation is a reasonable alternative to an unfair and unconstitutional irrebuttable presumption. Petitioners are entitled

to have a jury decide whether Joey's death was caused by service of alcohol to an adult who was so drunk that he could not hold himself on a barstool and could not voluntarily stop drinking.

The Court of Appeal cites dictum from Valdez v. J.D. Diffenbaugh Company, 51 Cal.App.3d 494, 509 (1975) for the proposition that proximate causation is a policy decision, not a factual issue. In the paragraph of the Valdez decision referred to by the Court of Appeal, the Valdez court concluded that proximate causation was present on the basis of an earlier determination that the defendant owed a duty of care and that the injury and manner of occurrence were foreseeable. [Ibid.] Valdez appears to confuse the

concepts of proximate causation and duty.

While the notions of duty and proximate causation are often blurred, the more reasoned approach treats duty as a policy decision appropriate for determination by the court and the issue of proximate cause as a question of fact for the jury. [6 Witkin, Summary of California Law (9th Ed. 1988) Torts, Section 748, 749, pp. 83-86.] Proximate causation is not a policy decision; it is a question of fact. [See Bigbee v. Pacific Telephone and Telegraph, 34 Cal.3d 49, 56 (1983).]

Even if proximate cause can, in some circumstances, be considered a policy decision, those circumstances do not apply to the anti-Vesely statutes.

Whether one calls it a duty or not, the legislature has made a policy decision in Business & Professions Code §25602(a) that alcohol should not be served to an obviously intoxicated person. The Court of Appeal's interpretation of the anti-Vesely statute as a contrary policy decision leads to inconsistencies within the statute. Such an interpretation is disfavored under usual rules of construction. To harmonize the statutes, the anti-Vesely statutes must be considered as factual, not policy, determinations which violate constitutional due process guarantees.

THIS APPEAL RAISES ISSUES OF GREAT PUBLIC CONCERN

This Court has historically noted probable jurisdiction in cases raising

issues of "growing nationwide importance . . ." [Camara v. Municipal Court, 387 U.S. 523, 525, 87 S.Ct. 1727 (1967).] Drunk drivers, victim's rights and the protection of minors are all significant social issues. The case should be set for plenary consideration.

More than 40,000 people die each year due to car accidents and another 1.3 million are disabled. [National Center for Statistics & Analysis, National Highway Traffic Safety Administration, Tracking the Alcohol Involvement Problem in U.S. Highway Crashes (1983).] Alcohol is implicated in more than half of these deaths: 58 percent of all fatalities involve individuals with some contact with alcohol, and 49 percent of the drivers

had blood alcohol levels of .10 percent or above. [Id.][6]

Alcohol is less likely to be involved in non-fatal car accident injuries -- only 17 percent -- but the more serious the injury, the more likely it is that alcohol is involved. [National Safety Council, Drunk Driving Facts (1982).] Nonetheless, approximately 200,000 non-fatal, serious injuries are attributable to drunk driving each year. [Id.]

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[6] A blood alcohol level of .10% is the most common legal standard for legal intoxication, R. Erwin, Defense of Drunk Driving Cases, Chapter 1, "Elements of the Offense - The Statutes and Judicial Interpretations" (Matthew Bender 1983), even though epidemiological research suggests that impairment for most people will begin at a blood alcohol level of .05% or lower, Baker, O'Neill & Karpf, the Injury Fact Book (1984).

Car accidents are the number one cause of death and serious injury for those under 25; young people constitute approximately 45 percent of the total of 24,000 annual drunk driving deaths. [National Center for Statistics & Analysis, National Highway Traffic Safety Administration, Tracking the Alcohol Involvement Problem in U.S. Highway Crashes (1983).] Such a statistic takes on an all-too-grim reality if one realizes that 14 teenagers are killed, and another 360 are injured, every day due to drunk driving.

Such havoc has not escaped judicial notice:

> "The drunk driver cuts a wide swath of death, pain, grief and untold physical and emotional

injury across the roads of California and the nation. The monstrous proportions of the problem have often been lamented in graphic terms by this court and the United States Supreme Court. (Citations omitted.) . . . [I]n the years 1976 to 1980 there were many more injuries to California residents in alcohol-related traffic accidents than were suffered by the entire Union Army during the Civil War, and more were killed than in the bloodiest year of the Vietnam War. (Citations omitted.) Given this setting, our observation that '(d)runken drivers are extremely dangerous people' (citation omitted) seems almost

> to understate the horrific risk posed by those who drink and drive.' Stopping the carnage wrought on California highways by drunk drivers is a concern the importance of which is difficult to overestimate." [Ingersoll v. Palmer, 43 Cal.3d 1321, 138-139 (1988) (quoting in part Burg v. Municipal Court, 35 Cal.3d 257, 262 (1983).]

Those who drink and drive often drink substantially to excess -- the mean blood alcohol level for drivers who had at least some level of alcohol in their blood is .16 percent. [National Center for Statistics and Analysis, National Highway Traffic Safety Administration, Tracking the

Alcohol Involvement Problem in U.S. Highway Crashes (1983).]

A recent Bureau of Justice Statistics survey of drinking drivers in 407 local jails in 1983 showed that nearly half had been sentenced for previous DWI convictions. Moreover, three-quarters of those repeaters had been in treatment. "The survey also showed a frightening level of drinking. The average drunken driver had drunk six ounces of alcohol, the equivalent of twelve beers or eight mixed drinks. More than a quarter of the drunken drivers had consumed at least ten ounces of alcohol, the equivalent of twenty beers or thirteen mixed drinks." [ABA Journal 56, September 1988.]

One way to "stop[] the carnage" is to stop the flow of alcohol. Stopping

the flow is possible because the flow is often in the hands of third parties. Studies indicate that most drunk drivers become intoxicated in places other than in their own homes. For example, two roadside breath-test surveys report that approximately 40 percent of those stopped who had blood alcohol levels of .10 percent or above were driving from bars or taverns. [Damkot, Alcohol Incidence in Rural Drivers: Characteristics of a Population and Clues for Counter Measures, 9 Drug & Alcohol Dependence 305, 322 (1982); Wolfe, 1973 U.S. National Roadside Breathtaking Survey, 4 Hit Lab Reports 73 (Highway Safety Research Institute, Univ. of Mich. 1974).] A somewhat higher number is reported for those arrested or

convicted of driving under the influence. [J. Mosher & Wallack, The DUI Project: Description of an Experimental Program to Address Drunk Driving Problems, 47 (1979); Ryan & Segars, San Diego County First Conviction Program Population Description 13 (1983); R. Yoder, Pre-arrest Behavior of Persons Convicted While Intoxicated, 36 J. Studies on Alcohol 1573, 1576 (1975).] Two studies have cited sports events as places often frequented by people who drink before driving, and airports and large discotheques have also been cited. [Mosher & Wallack, supra; Ryan & Segars, supra.]

As in this case, commercial sellers of alcohol are often the people who are pouring the alcohol for those who drink

and drive. Sellers of alcohol are often in the best position to prevent intoxicated persons from causing harm to innocent third parties. The seller observes the person in an intoxicated state and is the last person able to take measures to insure that the intoxicated person will not cause further harm to anyone but himself. Making commercial sellers civilly liable for the foreseeable injuries that result from their illegal sales of liquor to intoxicated persons[7] may well stop the flow of alcohol.

Potential civil liability can have a sobering effect on bars and bartenders. Taverns operators will train their employees with respect to

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[7] Every state prohibits sale of alcohol to obviously intoxicated persons. Mosher, §1.04[2][[b] at 1-18.

responsible serving practices. Bartenders will police the sobriety of the patrons more carefully. Tort suits also assist the state in forcing alcoholic beverage regulation.

During 1974 and 1975 there was a total of 48,000 alcoholic beverage licenses issued yet the California Department of Alcoholic Beverage Control filed only 582 accusations for violations of §25602. [Kindt v. Kauffman, supra, 57 Cal.App.3d at 873, n. 10.] The probable rate of violation is much greater than that handled by administrative agencies. Placing the burden of enforcement on the police and other law enforcement agencies is likewise a drain on taxpayer resources. Civil liability encourages saloonkeeper responsibility without requiring any

additional bureaucratic mechanism or burden to the taxpayer.

The effectiveness of imposing such liability is implicit in this case. Before appellees served Chase, three bars had refused him service. Chase was so drunk at the time he consumed his drink in defendant's bar -- he was falling off the stool -- that appellees would have been the only people who were in a condition to decide whether the driver was fit to consume any more liquor. If appellees had been deterred from making any sales by the prospect of liability for any injuries the drunken driver might have caused, appellants' son might be alive today.

CONCLUSION

For all of the foregoing reasons, this Court should note probable

jurisdiction of this appeal or, in the alternative, reverse the decision of the California Court of Appeal.

Respectfully submitted,

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APPENDIX A

APPENDIX A

OPINION BELOW

APPEAL from a judgment of the Superior Court of Orange County, Ronald M. Bauer, Temporary Judge. (Pursuant to Cal. Const., art. VI, §21.) Affirmed.

Paul G. Rees, Jr., Rintala, Smoot, Jaenicke & Brunswick and Robert A. Rees for Plaintiffs and Appellants.

Wankovsky & Rosenberg and Edward J. Wankovsky as Amicus Curiae on behalf of Plaintiffs and Appellants.

Wood, Ward & Garnet, and Gayle R. Posner for Defendants and Respondents.

Joseph and Doris Howe appeal from an order of dismissal after a demurrer to two counts of their complaint was sustained without leave to amend. Their causes of action against a bar

and a bartender for the wrongful death of their son, who was struck and killed by an intoxicated driver, were dismissed pursuant to statutes limiting an alcohol vendor's civil liability. (Business & Professions Code, §25602; Civ. Code, §1714.) The Howes assert (1) their claim falls outside the scope of these statutes, and (2) the legislation is unconstitutional.

FACTS

The Howes' first amended complaint was brought against Norchek of Newport, Inc. (doing business as Woody's Wharf), Robert Kinney and other defendants. They alleged their 20-year-old son, Joey, was killed when his bicycle was struck by a truck driven by Steven Chase who was intoxicated at the time.

The complaint contained two causes of action against Norchek and Kinney for claimed negligence and willful misconduct in serving alcohol to Chase. The following facts were alleged. Chase was extremely intoxicated when he arrived at Woody's Wharf, after having been refused service or ejected from at least three other establishments. Kinney, the bartender at Woody's, was aware of Chase's extreme intoxication; he observed the man fall off a barstool. In spite of this, Kinney continued to serve alcohol to Chase, with knowledge that Chase had lost control of himself and was unable to voluntarily stop drinking. Kinney knew Chase would be driving when he left. Kinney and Norchek intentionally sold Chase alcohol, with conscious disregard

for the consequences, for their own pecuniary gain. At the time of the accident, Chase had a blood alcohol level above .30% and did not even realize he had hit the boy. When the complaint was signed, Chase was in state prison, having pleaded guilty to felony charges.

The Howes' complaint requested general and punitive damages for emotional distress and loss of their son's care, companionship and monetary assistance. Norchek and Kinney demurred claiming they were immunized from civil liability under Business & Professions Code section 25602 and Civil Code section 1714.[1] Subdivisions

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[1] Business and Professions Code Section 25602 states: "(a) Every person who sells . . . any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is

guilty of a misdemeanor. [¶] (b) No person who sells . . . any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage. [¶] (c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as Vesely v. Sager (5 Cal.3d 153), Bernhard v. Harrah's Club (16 Cal.3d 313) and Coulter v. Superior Court (21 Cal.3d 144) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

Civil Code Section 1714 reads in pertinent part: "(a) Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care . . . . [¶] (b) It is the intent of the Legislature to abrogate the holding in cases such as Vesely v. Sager (5 Cal.3d 153), Bernhard v. Harrah's Club (16 Cal.3d 313) and Coulter v. Superior Court [(1978)] ([21] Cal.3d [144] and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing

(b) and (c) of each of those sections were added in 1978 to abrogate judicially-created liability for injuries resulting from the furnishing of alcohol to intoxicated persons. (Those subdivisions are referred to herein as the "1978 amendments".) The trial court sustained Norchek and Kinney's demurrer without leave to amend and dismissed the action as to these defendants only.

DISCUSSION

On appeal from a demurrer, an appellate court must determine whether the complaint states sufficient facts to show plaintiff "'"'may be entitled

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alcoholic beverages to an intoxicated person . . . [¶] (c) No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages . . . resulting from the consumption of such beverages."

to some relief.'"'" (Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 572.)

The Howes contend they are entitled to relief because the 1978 amendments are inapplicable to their action. They also challenge the constitutionality of the 1978 amendments on equal protection and due process grounds.

I

We first address the Howes' arguments the 1978 amendments are inapplicable to this case. In doing so, we are guided by our Supreme Court's recognition of the broad coverage of the amendments: "The 'single exception' to the 'sweeping immunity' afforded by the 1978 amendments [citation] is in cases of sale by a licensee to an obviously

intoxicated minor ([Business & Professions Code section] 25602.1)." (Strang v. Cabrol, (1984) 37 Cal.3d 720, 725.) "No other exceptions to this immunity exist." (Id., at p. 728.) At least three Courts of Appeal, however, have recognized other implied exceptions to the 1978 amendments. (Cantor v. Anderson (1981) 126 Cal.App.3d 124 [furnishing alcohol to person with an exceptional mental or physical condition]; Blake v. Moore (1984) 162 Cal.App.3d 700 [negligent entrustment of car to intoxicated driver]; O'Toole v. Carlsbad Shell Service Station (June 6, 1988, D005891) ___ Cal.App.3d ___ [negligent sale of gasoline to intoxicated driver].) And, in spite of its reference to a single exemption, the Strang court cited the

Cantor implied exception with approval. (Strang v. Cabrol, supra, 37 Cal.3d at p. 726.)

The Howes ask this court to recognize another implied exception to the amendments, which would significantly diminish an alcohol provider's immunity. They seek imposition of civil liability for furnishing liquor to an extremely intoxicated person who is unable to refuse another drink. The Howes contend, under those circumstances, the alcohol purveyor has sole control over the drinker's consumption, and the continued service of alcohol amounts to willful misconduct. They argue the 1978 amendments were not intended to abrogate liability for willful misconduct, but only for negligence.

In Cory v. Shierloh (1981) 29 Cal.3d 430, our Supreme Court recognized the 1978 amendments may apply to non-negligence theories of recovery, if the "essence of the charging allegations" falls within the statutory prohibition. (Id., at p. 436.) Here, the substance of the complaint is that defendants sold alcohol to an obviously intoxicated patron and the Howes were injured as a result. These allegations fall squarely within Business & Professions Code section 25602's bar to recovery. The Howes' only additional allegations involve the degree of the patron's intoxication, i.e., that he was "falling off the stool" drunk and had obviously lost all volition as to his drinking. The Howes assert these additional allegations bring them

outside of the statutory bar, relying primarily on Ewing v. Cloverleaf Bowl, (1978) 20 Cal.3d 389.

In Ewing, a bartender served a patron 10 shot glasses of 151 proof rum within a short period of time. He did so with knowledge of the drink's acute potency, of the patron's youth and inexperience, and of the immediate health risk created by an excessive consumption of alcohol. (Id., at pp. 397, 402-403.) The patron died of alcohol poisoning and his wife and children brought an action against the bartender. The trial court granted the bartender's motion for nonsuit after finding the patron had been contributorily negligent. (Id., at p. 394.) Our Supreme Court reversed, holding the jury could reasonably have

concluded the bartender engaged in willful misconduct, in which case the patron's contributory negligence would not bar plaintiffs' recovery. (Id., at pp. 401, 402.)

Ewing preceded the 1978 amendments and its continued viability is unclear. The Howes note Ewing was not expressly abrogated by the 1978 amendments, which specifically overturned "cases such as" Vesely v. Sager (1971) 5 Cal.3d 153, Bernhard v. Harrah's Club (1976) 16 Cal.3d 313, and Coulter v. Superior Court (1978) 21 Cal.3d 144, each of which involved negligence claims. The Legislature's reference to those three cases, however, was not intended to be a limiting one. (Strang v. Cabrol, supra, 37 Cal.3d at p. 725.) We think it unlikely that the willful

misconduct cause of action recognized in Ewing survives the 1978 amendments.[2] Those amendments reinstated the common law rule that the consumption of alcohol is the proximate cause of injury. A willful misconduct cause of action is grounded on the theory defendants' service of alcohol proximately caused injury. (See discussion of non-negligence claims in Hepe v. Paknad (1988) 199 Cal.App.3d

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[2] The legislative history of the 1978 amendments makes no reference to Ewing, but does suggest the legislation was intended to leave intact "existing case law which has generally denied the intoxicated person and/or his heirs any recovery against a person in violation of section 25602." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1645 (1977-1978 Reg. Ses.).) Furthermore, the legislative history evinces a clear intent to immunize alcohol providers from all civil liability for injuries caused by intoxicated persons, and not simply from negligence liability.

412, 415, 421; Cory v. Shierloh, supra, 29 Cal.3d at pp. 436-437.) Moreover, the 1978 amendments created an exception to the general principle that everyone is responsible for the results of his or her negligent or willful acts. (Civ. Code §1714, subds. (b) & (c); see Cory v. Shierloh, supra, 29 Cal.3d at p. 435.) We note the facts in this case are no more egregious than those in Vesely and Coulter, where plaintiffs alleged defendants served alcohol to "excessively intoxicated" persons who had lost volitional control over their drinking behavior. (Vesely v. Sager, supra, 5 Cal.3d at pp. 157-158; Coulter

v. Superior Court, supra, 21 Cal.3d at p. 148.[3]

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[3] The Howes cite a 1979 law review article which concludes Ewing is still viable, but also states that willful misconduct claims must be limited to suits by a patron involving "extremely culpable conduct by a bartender." (Duff, Legislation and the Ewing Case: The Status of the Patron Plaintiff (1979) 11 Sw.U.L.Rev. 1451, 1465, emphasis added.) The allegations of bartender misconduct here do not approach the level of culpability present in Ewing nor is the patron here the complaining party.

The Howes assert Business and Professions Code section 25602 is ambiguous, pointing to the reference in subdivision (b) to the sale or furnishing of alcohol "pursuant to subdivision (a)." They also cite the general principle that courts must narrowly construe statutes limiting recovery for tortious wrongs. (O'Toole v. Carlsbad Shell Service Station, supra, ___ Cal.App.3d at p. ___.) We find no ambiguity in the statute, however, and hence no need to narrowly construe it.

The Howes argue subdivision (b) must be strictly limited to negligence actions or "absurd results" will follow. To illustrate, they pose a hypothetical in which a bartender intends to murder a patron through alcohol poisoning. Civil liability for

We conclude the Howes' willful misconduct cause of action is barred by the 1978 amendments.

II

The Howes next contend their negligence and willful misconduct causes of action are cognizable under Cantor v. Anderson, supra, 126 Cal.App.3d 124, which recognized an alcohol provider's liability for furnishing liquor to a person with "an exceptional mental or physical condition." (Id., at p. 125.) There, a developmentally disabled man was supplied alcohol by defendants and, in a strong reaction to the intoxicant, suffered seizures and unconsciousness,

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murder, however, has independent statutory support. (Civ. Code §3294, subd. (d) [authorizing punitive damages for a wrongful death by felony homicide].)

and involuntarily attacked the plaintiff. (Id., at p. 126.) The court held the 1978 amendments do not extend immunity to a social host who serves a guest alcohol with knowledge of his or her exceptional mental or physical condition. (Id., at pp. 130-131.)

The Cantor court explained that the 1978 amendments reinstated both the common law rule of immunity and its common law exceptions. (Id., at p. 130.) The holding was based on an exception which the court believed was implicitly recognized in Cole v. Rush (1955) 45 Cal.2d 345, a case which applied the common law rule. In Cole, our Supreme Court stated "that as to a competent person it is the voluntary consumption, not the sale or gift, of

intoxicating liquor which is the proximate cause of injury from its use." (Id., at p. 356; emphasis added.)

The Cantor court cited Cole's reference to the applicability of the common law rule to the "ordinary," "competent" person. (Cantor v. Anderson, supra, 126 Cal.App.3d at p. 130.) In dicta the Cantor court stated: "Thus, the common law rule did not affect liability for the furnishing of alcoholic beverages to a person unable to voluntarily resist its consumption; e.g., one 'who was in such a condition as to be deprived of his will power or responsibility for his behavior . . .' [Citation.]" (Ibid.)

The Howes assert Chase too was drinking involuntarily; therefore,

their claim falls within the Cantor exception. We disagree. Although dicta in Cantor might support this conclusion, the court emphasized its holding was "a narrow one." (Id., at p. 132.) The court cautioned that retarded or developmentally disabled persons as a class should not be deemed incompetent. (Ibid.) It thus suggested that the determination of competency must be made on a case by case basis. It did not, however, provide any guidance as to the criteria for determining competency.

Nor did Cole define the terms "competent person" or "ordinary man."[4]

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[4] Cole did discuss competency in terms of volition (Id. at p. 354), but this discourse was qualified by its preliminary observation such analysis might be irrelevant under California law: "Other cases, from other jurisdictions, relied upon by

However, the drinker in that case was deemed competent because he was an "'able-bodied man'" who was sober when he arrived at the bar. (Cole v. Rush, supra, 45 Cal.2d at p. 354.) He did not lose his status as a competent person just because he was served alcohol to the point of becoming

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plaintiffs are clearly distinguishable on their facts, even if it be assumed that upon similar facts action would lie in California." (Id., at p. 352, emphasis added.) Thus, although the court factually distinguished Pratt v. Daly (1940) 55 Ariz. 535 [habitual drunkard was "incapable of voluntary action"] and other out-of-state decisions, it did so upon the reservation such cases might have no support under California law. Significantly for the instant case, the Cole holding was expressly based on three California cases, one of which affirmed the immunity of a defendant tavern keeper who sold alcohol to a minor "while he was already under the 'severe influence of intoxicating liquors.'" (Id., at p. 350, emphasis omitted, citing from Fleckner v. Dionne (1949) 94 Cal.App.2d 246, 247.)

intoxicated and belligerent. (Id., at p. 347.) Cole and Cantor indicate incompetency relates to exceptional mental or physical conditions, existing independently of alcohol consumption, which interact with such consumption to cause injury.

Recently, the Sixth District in Hepe v. Paknad, supra, 199 Cal.App.3d 412 declined to expand the Cantor exception, finding it did "not have a sound statutory basis." (Id., at p. 418.)

There is no California precedent for recognition of an exception based on the incompetency of the drinker due to extreme intoxication. To recognize one here would undermine the legislative mandate, as severe intoxication would be alleged in a case where injury

results. The statute is clear; it creates immunity for the provision of alcohol to "any habitual or common drunkard" or "obviously intoxicated person." (bus. & Prof. Code, § 25602, subd. (a).) There is no authority for the exception the Howes propose.

III

The Howes contend Business & Professions Code section 25602, subdivision (b) should be interpreted to extend immunity only for direct physical injuries and not for emotional harm. They provide no authority for such a narrow interpretation of the term "injury." Their reliance on Garcia v. State of California, (1967) 247 Cal.App.2d 814 is misplace. That case involved the narrow interpretation of a public entity's statutory immunity

from prisoner lawsuits, holding a prisoner's heirs might still bring a cognizable wrongful death action. The decision was based on the plain language of the statute and the underlying legislative intent, and did not involve any narrow interpretation of the work "injury." (Id., at p. 816.)

Without evidence of any legislative intent supporting the Howes' interpretation, it is unreasonable to read the statute to permit recovery only by those who suffer emotional harm.

IV

The Howes next challenge the constitutionality of the 1978 amendments on equal protection and due process grounds. They contend the

amendments violate the federal and state equal protection clauses because they discriminate against certain victims of crime and innocent minors. They assert that while most victims of crime may bring civil suit against the perpetrators, those injured by criminal bartenders may not. Furthermore, minors injured through their own intoxication may bring civil suit (see Chalup v. Aspen Mine Co. (1985) 175 Cal.App.3d 973), but young people harmed through no fault of their own may not. The Howes conclude the amendments create arbitrary classifications violative of equal protection guarantees. They are joined in their arguments by amicus curiae.

Our Supreme Court, however, has sustained the amendments against

similar equal protection challenges in Cory v. Shierloh, supra, 29 Cal.3d at pp. 437-441. That case is factually distinguishable, but its conclusions as to the statutes' constitutionality are controlling here. It is true that alcohol providers are accorded more favorable treatment than other criminals who are not immunized from civil liability; however, the Cory court concluded that the general rule of immunity for alcohol suppliers "is both founded upon a possible rational basis and reasonably related to a legitimate state purpose." (Id., at p. 440.) The Cory court also upheld section 25602.1's special treatment of minors harmed through their own intoxication, concluding "the Legislature might reasonably have

deemed [minors] more in need of safeguarding from intoxication than adults, because of the comparative inexperience of minors in both drinking and driving." (Id., at p. 441.) The court specifically noted the anomaly that an "obviously intoxicated minor, and those injured by him, retain a cause of action against the seller, but an adult consumer, and those similarly injured by him do not [citation]." (Id., at p. 440.) Nonetheless, the court's "function [was] to find, if possible, some means to sustain, not reflect, those amendments." (Ibid.)

Finally, the Howes argue that 1978 amendments violate the due process clause by creating an irrebuttable presumption that the consumption of

alcohol is the proximate cause of resulting injuries. They argue the issue of causation should not be taken from the fact-finder. Proximate cause, however, "is not a question of causation; it is simply a policy determination of whether or not the defendant should be held responsible for his acts. [Citation.]" (Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal.App.3d 494, 509.) The Legislature has broad authority "to abolish tort causes of action" (Cory v. Shierloh, supra, 29 Cal.3d at p. 439.), as it did in the 1978 amendments.

Judgment affirmed.

NOT TO BE PUBLISHED.

SCOVILLE, P. J.

I CONCUR:

WALLIN, J.

SONENSHINE, J.

I reluctantly concur. I find the majority opinion persuasive. The Legislature did not intend for this cause of action to survive the most recent legislative amendments. And we cannot ignore legislative intent no matter how distasteful the result.

However, I suggest the Legislature reexamine this issue. Drunk driving is too dangerous in its results to be ignored. Those who are responsible for this evil should not be elevated to a special status which serves to shield them from liability.

S/SONENSHINE
SONENSHINE, J.

APPENDIX B

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

CASE NO. 47 52 19

JOSEPH HOWE et al.

v.

NORCHECK OF NEWPORT, INC. et al.

IT IS HEREBY ORDERED:

That the first amended complaint of JOSEPH AND DORIS HOWE against defendant NORCHEK OF NEWPORT, INC., dba WOODY'S WHARF AND ROBERT KINNEY be dismissed, pursuant to Code of Civil Procedure, Section 582(c)

S/Ronald L. Bauer

APPENDIX C

APPENDIX C

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 3, No. G004468
S006827

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

JOSEPH HOWE et al.

v.

NORCHECK OF NEWPORT, INC. et al.

Appellants' petition for review

DENIED.

LUCAS
Chief Justice

APPENDIX D

APPENDIX D

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

No. G004468 (OCSC No. 475219)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

JOSEPH HOWE et al.

v.

NORCHEK OF NEWPORT, INC. et al.

TO EACH PARTY AND ATTORNEY OF RECORD:

NOTICE IS HEREBY GIVEN that plaintiffs Joseph Howe and Doris Louise Howe the above-named appellants hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, Fourth Appellate District,

Division Three, affirming the dismissal of the complaint entered in this action on July 5, 1988. The Supreme Court of the State of California denied review on this case on September 21, 1988.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED: November 30, 1988

Paul G. Rees

RINTALA, SMOOT, JAENICKE & BRUNSWICK

By /S/
Robert A. Rees
Attorneys for Plaintiffs and Appellants Joseph Howe and Doris Louise Howe

APPENDIX E

APPENDIX E

FIFTH AMENDMENT, UNITED STATES CONSTITUTION:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION:

> "Section 1. . . . No state shall . . . deprive any person of life, liberty, or property, without due process of; nor deny to any person within its jurisdiction the equal protection of the laws."

CALIFORNIA BUSINESS & PROFESSIONS CODE §25602:

> "(a) Every person who sells . . . or causes to be sold . . . any alcoholic

beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.

(b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of the intoxication by the consumer of such alcoholic beverage.

(c) The Legislature hereby declares that this

section shall be interpreted so that the holdings in cases such as Vesely v. Sager (5 Cal.3d 153), Bernhard v. Harrah's Club (16 Cal.3d 313) and Coulter v. Superior Court (21 Cal.3d 144) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person."

CALIFORNIA BUSINESS & PROFESSIONS CODE §25602.1:

Notwithstanding subdivision (b) of Section 25602, a cause of action may be brought by or on behalf of any

person who has suffered injury or death against any person licensed . . . pursuant to section 23300 . . . who sells . . . or causes to be sold . . . any alcoholic beverage . . . to any obviously intoxicated minor where the . . . sale . . . of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person."

CALIFORNIA CIVIL CODE §1714(b):

> "It is the intent of the Legislature to abrogate the holdings in such cases as Vesely v. Sager . . ., Bernhard v. Harrah's Club . . ., and Coulter v. Superior Court . . . and to reinstate the prior judicial interpretation of this

section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person."

Supreme Court, U.S.
FILED
APR 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1095

(2)

In The

Supreme Court of the United States

October Term, 1988

JOSEPH HOWE and DORIS LOUISE HOWE,

Appellants,

vs.

NORCHEK OF NEWPORT, INC.
d/b/a WOODY'S WHARF; ROBERT KINNEY,

Appellees.

APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

MOTION TO AFFIRM OR DISMISS

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No. 88-1095

In The

Supreme Court of the United States

October Term, 1988

JOSEPH HOWE and DORIS LOUISE HOWE,

Appellants,

vs.

NORCHEK OF NEWPORT, INC. d/b/a WOODY'S WHARF; ROBERT KINNEY,

Appellees.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION THREE

MOTION TO AFFIRM OR DISMISS

Appellees Norchek of Newport, Inc. d/b/a Woody's Wharf and Robert Kinney move for summary affirmance of the judgment of the Court of Appeal of California, which held that California Business and Professions Code sections 25602 and 25602.1 and California Civil Code section 1714(b) do not violate appellants' rights to equal protection and due process under the Fifth and Fourteenth Amendments to the United States Constitution. Alternatively, appellees move for dismissal of this appeal on the ground it does not present a substantial federal question.

STATEMENT OF THE CASE[1]

Appellees are servers of alcoholic beverages. They allegedly served alcohol to Steven Chase when he was obviously intoxicated. Chase then drove away from appellees' establishment in a pick-up truck. Chase's vehicle struck and killed appellants' 20-year-old son, Joseph, who was riding a bicycle along the road.

Appellants subsequently instituted the present action against appellees and others in the Superior Court of California for the County of Orange. Appellants alleged causes of action against appellees for negligence and willful misconduct. Appellees filed a demurrer to the complaint on the ground that California Business & Professions Code § 25602(b) granted appellees immunity from civil liability for their conduct. The superior court sustained the demurrer and ordered that the complaint be dismissed without leave to amend.

Appellants appealed to the Court of Appeal of California, which affirmed the dismissal of their complaint. The Court of Appeal rejected appellants' contention that California Business and Profession Code sections 25602 and 25602.1 violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, as well as their contention that California Business and Professions Code section 25602(c) and California Civil Code

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[1]This appeal arises from an order dismissing appellants' complaint without leave to amend. Thus, this case has not been tried and appellants have yet to prove the truth of their allegations. The facts recited herein are those alleged by appellants, which appellees assume to be true for purposes of the present motion.

section 1714(b) violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Appellants sought review in the Supreme Court of California, which declined to hear the case.

The remaining facts are adequately set forth in appellants' Statement of the Case.

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SUMMARY OF ARGUMENT

Appellants' equal protection arguments merely challenge the wisdom and necessity of run-of-the-mill economic and social legislation. The legislation in question does not employ suspect classifications, nor does it infringe fundamental rights. The legislation is therefore reviewed under the deferential rational basis standard.

The statutes at issue are rational and serve legitimate state interests. Indeed, the California legislature had ample reason to reenact the former common law rule of immunity for providers of alcohol. The more recent court-created rule that providers of alcohol could be liable for injuries inflicted by those who consumed the alcohol violated a widely shared belief that the responsibility for injuries caused by an intoxicated person should be borne by him alone and not shifted to remote third parties. Moreover, the rule of civil liability had given rise to an insurance crisis which threatened to undermine significant segments of the state's economy. Rather than endure the social and economic consequences of the civil liability rule, the legislature concluded that, except in cases of obviously intoxicated minors (who face special risks and require special

protection), the problem of alcohol-related injuries should be addressed through enhanced administrative and criminal sanctions.

Appellants fail to demonstrate that the legislative response to the problem of drunk driving was irrational. They merely argue it would have been fairer and more effective to allow providers of alcohol to be subject to suit in all cases. However, it is not the province of the courts to evaluate the wisdom or desirability of the legislation. Since the legislation at issue is rationally related to legitimate state interests, appellants' equal protection arguments fail to raise a substantial federal question and should be dismissed.

Appellants' due process claim must fail because the legislation at issue does not deprive them of life, liberty, or property. Even if the due process clause were applicable, appellants' argument that the legislation creates an unconstitutional irrebuttable presumption rests on both a gross misreading of the statutes at issue and a fundamental misunderstanding of the irrebuttable presumption doctrine. Contrary to appellants' assertion, the statutes at issue contain no presumptions concerning lack of causation or any other fact. The statutes refer to "proximate causation," which is a matter of law not fact.

In addition, unlike other parties who have successfully invoked the irrebuttable presumption doctrine, appellants do not claim they have been wrongly included in, or excluded from, any statutory class. Nor do appellants identify any presumed facts which, if rebutted, would place them within the class of persons entitled to maintain a civil action against appellees. Appellants argue they should be

given a hearing on the issue of causation. Under the statutes at issue, however, causation is immaterial. Appellants' action is barred regardless of whether appellees' conduct caused injury. The irrebuttable presumption doctrine is therefore inapplicable in this case.

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SUMMARY OF THE PERTINENT LEGISLATION

In a series of statutory enactments in 1978, the California legislature addressed the subject of civil liability of businesses and persons who serve alcoholic beverages. *See* Cal. Bus. & Prof. Code §§ 25602(b), (c), 25602.1-.3 (West 1985); Cal. Civil Code § 1714(b) (West 1985) (hereinafter referred to collectively as the "1978 amendments"). The legislature retained an existing provision making it a misdemeanor to sell or furnish alcoholic beverages to an obviously intoxicated person. *See* Cal. Bus. & Prof. Code § 25602(a) (West 1985). The 1978 amendments provided that one who commits that misdemeanor shall not be civilly liable for the injuries inflicted on any person as a result of the intoxication by the consumer of the beverage. *Id.*, § 25602(b).

The 1978 amendments expressly abrogated a recent line of California Supreme Court decisions upholding civil liability of providers of alcohol, and reinstated the "prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person." *Id.*, § 25602(c) [expressly abrogating *Vesely v. Sager*, 5 Cal.3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971); *Bernhard v. Harrah's Club*, 16 Cal.3d

313, 546 P.2d 719, 128 Cal.Rptr. 215, *cert. denied,* 429 U.S. 859 (1976); and *Coulter v. Superior Court,* 21 Cal.3d 144, 577 P.2d 669, 145 Cal.Rptr. 534 (1978)]; Cal. Civ. Code, § 1714(b) (West 1985) [same]. The legislature retained civil liability only in the narrow class of cases where a licensed seller of alcoholic beverages sells alcohol to an obviously intoxicated *minor* and that sale proximately causes personal injury or death.[2] Cal. Bus. & Prof. Code § 25602.1 (West 1985).

While the 1978 amendments eliminated civil liability in most cases, they strengthened the authority of the Alcoholic Beverage Control Department ("ABC") to punish liquor licensees who violate the statutory proscription against serving alcohol to obviously intoxicated persons. The legislation authorized the Director of ABC to seek injunctive relief to prevent a licensee from continuing to serve obviously intoxicated patrons. The legislation also prohibited a licensee who has a prior violation involving sale to an obviously intoxicated person from petitioning on a subsequent violation for a "compromise" sanction allowing the licensee to pay a fine in lieu of having its license suspended. *Id.*, §§ 25602.2-.3.

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[2]This exception was amended in 1985 to extend liability to both licensed and unlicensed sellers of alcoholic beverages. *See Baker v. Sudo,* 194 Cal.App.3d 936, 944, 240 Cal.Reptr. 38, 43 (1987).

ARGUMENT

I.

APPELLANTS' EQUAL PROTECTION ARGUMENTS FAIL TO RAISE A SUBSTANTIAL FEDERAL QUESTION

A. The 1978 Amendments Should Be Reviewed Under The Deferential "Rational Basis" Standard.

The 1978 amendments abrogated a relatively recent, court-created rule of tort liability. The amendments employ no suspect classification, nor do they infringe on any fundamental rights.[3] Accordingly, this Court should evaluate the 1978 amendments under the deferential rational basis standard. *See Duke Power Co. v. Carolina Env't. Study Group, Inc.*, 438 U.S. 59, 83 (1978) [constitutionality of provision of the Price-Anderson Act limiting liability for injuries caused by nuclear power plant accidents governed by the rational basis test]; *Edelstein v. Wilentz*, 812 F.2d 128 (3d Cir. 1987) [statute granting immunity to persons filing ethics grievances against attorneys subject to rational basis test]; *Morris v. Hotel Riviera, Inc.*, 704 F.2d 1113, 1114 (9th Cir. 1983) [rational basis test applies to statute limiting innkeepers' liability for guests' property losses]; *Sidle v. Majors*, 536 F.2d 1156, 1157 (7th Cir.), *cert. denied*, 429 U.S. 945 (1976) [rational basis test applies to statute immunizing automobile driver from tort liability to nonpaying passenger].

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[3]Appellants halfheartedly suggest that the 1978 amendments "affect a fundamental personal right, the right to life." Appellants' Jurisdictional Statement 13 n.3 (hereinafter "Jur. Stmt."). This suggestion is meritless and barely warrants a response. The 1978 amendments do not affect or infringe any person's right to life. Appellants do not develop the suggestion and, indeed, proceed to analyze the 1978 amendments under the rational basis test.

Under the rational basis standard, the 1978 amendments are entitled to a presumption of constitutionality. *New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976) (per curiam). To pass muster under the equal protection clause, the 1978 amendments need only be rationally related to a legitimate state interest.[4] *Id.* "[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations . . . ; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *Id.*

B. The Civil Immunity Granted By California Business And Professions Code Section 25602 And California Civil Code Section 1714(b) Is Rationally Related To Legitimate State Interests.

1. States Have Broad Authority To Limit Tort Remedies And Create Immunities.

Appellants contend the 1978 amendments violate the equal protection clause by "providing to one class of citizens, namely licensed providers of alcohol, a civil immunity for their criminal acts," thereby discriminating against "victims of crime." Jur. Stmt. at i, 24. Although appellants employ emotionally-charged labels, their real

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[4]Appellants incorrectly assert that in evaluating the rational basis for a statute, "the court should look at the actual legislative purposes." Jur. Stmt. at 17. On the contrary, it is well-established that "a legislative classification will not be set aside if *any* state of facts rationally justifying it is demonstrated to or perceived by the courts." *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970) (per curiam) (emphasis added); *see also Vanderwater v. Hatch*, 835 F.2d 239, 244 (10th Cir. 1987) [court need not inquire into the actual, subjective motivation of the state legislature].

complaint is simply that the California legislature decided to grant civil immunity to a class of persons who might otherwise be held liable in tort. *See* Jur. Stmt. at 25.

Appellants suggest that the mere "grant [of] an economic preference—immunity—to one group of citizens at the expense of another . . . is constitutionally prohibited." Jur. Stmt. at 26. Appellants are plainly wrong. A state may create civil immunities and bar tort remedies as long as it has a rational reason for doing so. As this Court has explained, "[t]he 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' [citations], despite the fact that 'otherwise settled expectations' may be upset thereby. [Citations.] Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts. [Citations.]" *Duke Power Co.*, 438 U.S. at 88 n.32. Numerous cases have affirmed the constitutionality of statutory tort immunities, including the very immunity at issue here, notwithstanding tort "victims" were thereby denied a right of action. *See Vanderwater v. Hatch*, 835 F.2d 239 (10th Cir. 1987); *International Adm'rs, Inc. v. Life Ins. Co. of N. America*, 753 F.2d 1373, 1380 (7th Cir. 1985); *Simpson v. United States*, 652 F.2d 831 (9th Cir. 1981); *Corey v. Jones*, 650 F.2d 803 (5th Cir. 1981); *Cory v. Shierloh*, 29 Cal.3d 430, 439, 629 P.2d 8, 174 Cal. Rptr. 500 (1981).

Appellants argue the state cannot immunize from civil liability conduct that could give rise to criminal liability. Appellants cite no authority, and we have found none, to support their novel proposition. Despite appellants' pro-

testations that "[e]very victim should have the right to sue the criminal that caused his injury" Jur. Stmt. at 26, the commission of a crime does not necessarily generate a right to sue in tort. A party's right to seek tort damages derives from common law principles of duty and liability which, as this Court has held, may be abrogated by the legislature to serve other legitimate state interests.

2. The California Legislature Had Numerous Legitimate Reasons For Granting Civil Immunity To Sellers Of Alcohol.

The legislative history of the 1978 amendments establish that the legislature had ample reasons for enacting a general rule of tort immunity. The policy considerations which influenced the legislature included the following:

1. First, the legislature concluded that as a matter of social policy an adult can and should be responsible for his own consumption of alcohol and that responsibility for injuries caused by an intoxicated person should be borne by him alone and not shifted to third parties.[5] *Cory v. Shierloh*, 29 Cal.3d at 439-40, 629 P.2d at 13, 174 Cal.Rptr. at 505; *see also* Note, *Liability of Liquor Suppliers in California: A Return to the Common Law*, 12 U.C. Davis

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[5]Significantly, while the legislature conferred immunity on those who serve alcoholic beverages, it did not leave the victim of drunk driving without a remedy. A person injured by a drunk driver can obtain full compensation by filing a tort action against the intoxicated person. If the intoxicated driver is not insured, the injured party can still receive payment from his own uninsured motorist insurance coverage, which is mandatory in California. Cal. Ins. Code § 11580.2 (West Supp. 1989). If the injured party also has no insurance, he may claim benefits under the Victims of Violent Crimes Act, California Government Code sections 13959-13969.2.

L.Rev. 191, 202 (1979) (hereinafter "*Liability of Suppliers*").

This central purpose of the legislation was identified by its proponent, Senator Ruben S. Ayala, when he introduced the bill. Senator Ayala explained: "I believe that every person is responsible for his or her willful acts and for any injury occasioned to another by his or her want of ordinary care or skill." Senate Committee on Judiciary, Background Information and Accompanying Press Release [Appendix at A-3].[6] This sentiment was echoed by the California Democratic Party in a resolution supporting the elimination of third-party liquor liability. The Party declared: "[T]hose who abuse the use of alcohol should be responsible for their own intoxicated behavior, and . . . the drinker of alcoholic beverages, not the furnisher thereof, should be liable for negligent acts arising out of his abuse of alcohol." Letter from United Spirits Association to Senator Ayala (quoting California Democratic Party resolution) (April 7, 1978) [Appendix at A-15]; *accord* Letter from the California State University and Colleges Student Presidents Association to Governor Edmund G. Brown, Jr. (August 28, 1978) [Appendix at A-19] ["the current liability laws . . . make third parties unreasonably liable for another person's mistake"]; Letter from the California Conference Board Amalgamated Transit Union Division Locals to Governor

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[6]This Court may take judicial notice of documents reflecting a statute's legislative history. *Territory of Alaska v. American Can Co.*, 358 U.S. 224, 226-27 (1959); *see also Korematsu v. United States*, 584 F.Supp. 1406, 1414 (N.D. Cal. 1984). For the Court's convenience, such documents referred to herein are set forth in the attached appendix.

Brown (September 12, 1978) [Appendix at A-21] ["It is simply not equitable to permit the erosion of well-established liability principles simply for the sake of finding solvent defendants"].[7]

The legislature also could take note of the fact that imposing liability on those who serve alcohol would have a "chilling effect" on the service of alcohol in all contexts, thereby unfairly reducing the enjoyment of responsible consumers at social functions in both private homes and commercial establishments. *See Brown v. Merlo,* 8 Cal.3d 855, 872 n.12, 506 P.2d 212, 224, 106 Cal.Rptr. 388, 400 (1973) ["the promotion of hospitality is clearly a permissible and worthwhile goal"].

2. The second factor which influenced the legislature was the detrimental effect of the new, third-party liability rule on important local industries, including restaurants and bars, hotels and motels, bowling alleys, liquor distributors and retailers, social clubs and other associations that sponsor social events. After the courts announced the new liability rule, insurance rates skyrocketed. In many

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[7]The broad support for the 1978 amendments among groups representing a wide spectrum of public views is compelling evidence the legislation was rationally related to accepted public values and priorities. Among the groups expressing support were California State University and Colleges Student Presidents Association, San Pedro Chamber of Community Development and Commerce, Bowling Properties Association of California, Veterans of Foreign Wars, Native Sons of the Golden West, American Legion, Moose Club, United Spirits Association, California Conference Board Amalgamated Transit Union Division Locals, and California Chamber of Commerce. See Senate Democratic Caucus, Analysis of S.B. 1645 (As Amended 5-17-78) [Appendix at A-4 to A-5]; individual letters from proponents [Appendix at A-20, A-23].

cases, adequate insurance became unavailable.[8] *Liability of Suppliers, supra,* 12 U.C. Davis L.Rev. at 202 n. 69-71; Analysis of Senate Bill 1645 by Senate Committee on Judiciary [Appendix at A-9] [referring to rising insurance costs and noting that, according to one proponent, premiums for tavern owners increased from $35,000 to $160,000 per year]; Analysis by Assembly Office of Research (May 17, 1978) [Appendix at A-13] [same]; Letter from the California Chamber of Commerce to Governor Brown (August 31, 1978) [Appendix at A-23] [stating liability insurance premiums increased 400% and more for its members]; *Kindt v. Kaufman,* 57 Cal.App.3d 845, 874 n. 11, 129 Cal.Rptr. 603, 622 (1976), *disapproved on other grounds, Ewing v. Cloverleaf Bowl,* 20 Cal.3d 289, 572 P.2d 1155, 143 Cal.Rptr. 13 (1978) [referring to newspaper reports of vastly increased premiums].

This insurance crisis threatened the well-being of significant segments of the state economy. Many businesses, especially small- and medium-sized ones, were forced either to go out of business or to carry no insurance at all because they could not afford the increased premiums. See Letter from United Spirits Association to Senator

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[8]One of the reasons for the huge increase in insurance premiums was the fact that third-party suits not only carried tremendous exposure, they were practically indefensible. Bars, restaurants and hotels inevitably would be sued in almost every case involving an alcohol related injury since the provider of alcohol, if insured, typically carried more insurance than the individual intoxicated driver. However, since the alcohol provider might not be notified of the suit until long after the underlying accident, the provider would have no way to prove that it had not served the driver or that the driver was not obviously intoxicated. *See* Letter from United Spirits Association to Senator Ayala, *supra* [Appendix at A-17].

Ayala, *supra* [Appendix at A-17] [stating that most liquor licensees were not buying insurance due to the prohibitive cost]; Letter from Insurance Agents and Brokers Legislative Counsel to Governor Brown (September 13, 1978) [Appendix at A-25 to A-26] [regarding effect of insurance crisis on small businesses]; Letter from Cal. Licensed Beverage Ass'n to Governor Brown (August 31, 1978) [Appendix at A-27] [same]. Ironically, by driving the cost of insurance to prohibitive levels, the court's new liability rule actually undermined the goal of providing greater compensation to injured parties. Liquor licensees operating without insurance would be unable to pay for a plaintiff's damages. Thus, the only effect of a large judgment in favor of an injured person would be to force the liquor licensee out of business.

The 1978 amendments represented a rational legislative response to these threats and a legitimate attempt to protect the state's economy. This Court has recognized the legislative power to enact legislation designed to protect the economic viability of important business enterprises. In *Duke Power Co.*, 438 U.S. at 93-94, this Court upheld legislation designed to encourage the development of the atomic energy industry by limiting liability for nuclear accidents. This Court stated that the goal of protecting that industry was "ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes." *Id.*; *see Morris v. Hotel Riviera, Inc.*, 704 F.2d at 1114 [legislative purpose of protecting and enhancing state's important tourism industry justified statute limiting hotels' liability for property loss]; *International Adm'rs, Inc. v. Life*

Ins. Co. of N. America, 753 F.2d at 1380 [statute providing immunity to insurance companies for statements made in cancellation notices did not violate equal protection simply because it was enacted to create a special benefit for the insurance industry]; *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 157-62, 695 P.2d 665, 678-82, 211 Cal.Rptr. 368, 382-85 (1985) [statutory limitation on damages recoverable for medical malpractice ensured health care providers affordable insurance and was thus rationally related to legitimate state interest in maintaining health care industry]. As in the foregoing cases, the threat to California businesses posed by the third-party liability rule provided a legitimate and rational reason to adopt a rule of dram shop immunity.

3. Finally, the legislature reasonably concluded that imposition of criminal and administrative penalties, rather than civil liability, would effectively ensure that alcohol would not be served to intoxicated persons. *See* Letter from United Spirits Association to Senator Ayala, *supra* [Appendix at A-15 to A-16]. While it is conceivable the threat of civil liability might have further deterred the service of alcohol to obviously intoxicated patrons, the Constitution does not require that every conceivable means of attacking a perceived social problem be enacted into law. *See Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935). The California legislature acted well within its province in concluding that the additional deterrent value of civil liability was insufficient to justify the resulting social and economic costs.

In sum, the legislature's decision to confer civil immunity on providers of alcohol rested on a rational social and economic basis. Appellants' equal protection challenge to the 1978 amendments is without merit.

C. California Business And Professions Code Section 25602.1, Which Allows Suit Against Persons Who Serve Obviously Intoxicated Minors, Embodies A Rational Exception To The General Rule Of Immunity.

1. Appellants Mischaracterize The Effect Of Section 25602.1. It Does Not Discriminate Between "Innocent" And "Criminal" Minors.

Appellants contend that the 1978 amendments violate the equal protection clause of the Fourteenth Amendment by discriminating against "innocent" minors and in favor of "criminal" minors, i.e., minors who consume alcohol. Jur. Stmt. at i, 12. Appellants simply mischaracterize the legislation. California Business and Professions Code section 25602.1 provides that, notwithstanding the general rule of immunity established in section 25602(b), "a cause of action may be brought by or on behalf of *any* person who has suffered injury or death" against a person who sells alcoholic beverages to an obviously intoxicated minor, where the sale of the beverage to the minor is the proximate cause of the personal injury or death. Cal. Bus. & Prof. Code § 25602.1 (West 1985) (emphasis added). The injured person has a cause of action whether he is "innocent" or "criminal," minor or adult.[9]

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[9]Even if appellants were correct that the legislation discriminates against "innocent minors," they would have no standing to mount a challenge under the equal protection clause. As a general rule, a person has no standing to assert the constitutional claims of third parties who are not before the court. *See Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976); *United States v. Raines*, 362 U.S. 17, 21 (1960). Appellants have no standing to assert the rights of minors, innocent or otherwise, because neither they nor their son, who was 20 years old when he died.

(Continued on following page)

The statute does not distinguish between classes of potential plaintiffs but between classes of potential *defendants*. Those who serve alcohol to obviously intoxicated adults are civilly immune, while those who serve alcohol to obviously intoxicated minors may be liable. Appellants' only complaint is that the legislature did not go far enough, that it should have imposed liability on both groups of servers. As we next show, the legislature's decision to grant immunity to one class of potential defendants but not another does not violate the equal protection clause because there was a rational basis for the decision.

2. The "Minors" Exception Was A Rational Means Of Reconciling The Competing Goals Of Protecting Minors, Promoting Public Safety, And Ensuring The Economic Viability Of Servers Of Alcoholic Beverages.

As discussed above, one reason the California legislature enacted the general rule of immunity codified in California Business and Professions Code section 25602 and California Civil Code section 1714(b) was the legislature's conclusion that administrative and criminal sanctions were sufficient to deter the sale of liquor to intoxi-

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(Continued from previous page)

fall within that class. *See* Cal. Civ. Code § 25 (West 1985) ("Minors are all persons under 18 years of age"). In any event, appellants do not purport to represent their son's interests in this action. The causes of action alleged against appellees are appellants' own claims for negligence and willful misconduct.

Appellants' lack of standing to assert the rights of "innocent" minors is demonstrated by the fact that if this Court requires California to afford such minors a cause of action against providers of alcohol, appellants will not benefit in the least. As adults, their suit will still be barred.

cated persons and that, accordingly, the burdens and costs of imposing civil liability as an additional deterrent were unjustified.

The legislature balanced the benefits and burdens differently in cases where alcohol is served to an obviously intoxicated *minor*. In that situation, the legislature reasonably determined that an added deterrent, in the form of civil liability, was justified because the consumption of alcohol by an intoxicated minor is a significantly greater social evil.

The brief submitted by amicus curiae Mothers Against Drunk Driving ("MADD") validates the legislative judgment. According to MADD, "[t]he toll [of drunk driving] is heaviest upon the young: Traffic crashes are the number one cause of death and serious injury for those under twenty-five years of age; young people constitute approximately thirty-eight percent of the total 23,630 annual drunk driving deaths. . . . Nine teenagers die, and hundreds of others are injured, every day due to drunk driving." Amicus Curiae Brief by Mothers Against Drunk Driving 5-6. The equal protection clause does not require a state "to strike at all evils at the same time or in the same way." *Semler v. Oregon State Bd. of Dental Examiners,* 294 U.S. at 610. In light of the special dangers posed by intoxicated young persons, it was rational for the legislature to impose greater liability on those who serve alcohol to intoxicated minors than on those who provide alcohol to adults.

The minors exception is justifiable on another ground, as well. The common law rule of immunity codified in the 1978 legislation presumes an adult consumer can drink

responsibly. Thus, it is his consumption of alcohol, rather than the service of alcohol to him, which is deemed the cause of resulting injuries. *See* Cal. Bus. & Prof. Code § 25602(c) (West 1985); Cal. Civil Code § 1714(b) (West 1985). In contrast, our society presumes that minors are *not* competent to appreciate and deal with the detrimental effects of alcoholic beverages. For this very reason, California law makes it a misdemeanor to sell, furnish or give alcoholic beverages to a person under the age of 21. Cal. Bus. & Prof. Code § 25658 (West 1985); *Brockett v. Kitchen Boyd Motor Co.*, 24 Cal.App.3d 87, 93, 100 Cal. Rptr. 752, 756 (1972) [section 25658 was enacted because "presumably the legislative body believed that most minors are neither physically nor mentally equipped to handle the consumption of intoxicating liquor"].

In light of the limited capacity of minors to consume alcohol responsibly, the service of alcohol to the minor becomes a more significant factor in the causation of any resulting injuries. Thus, the legislature could reasonably require adults to assume responsibility for and exercise control over a minor's consumption of alcohol and could reasonably impose civil liability on irresponsible adults who fail to do so. As the California Supreme Court has explained:

> [T]he Legislature might reasonably have deemed [minors] more in need of safeguarding from intoxication than adults, because of the comparative inexperience of minors in both drinking and driving. Given society's solicitous concern with minors . . ., the Legislature perhaps might reasonably suspend the sole theory otherwise advanced in justification of the subject legislation, namely, that it is the consumption alone, not the furnishing, of liquor which causes the resultant deaths and injuries.

Cory v. Shierloh, 29 Cal.3d at 441, 629 P.2d at 14, 174 Cal.Rptr. at 506.

Despite the obvious rational basis for the minors exception, appellants contend section 25602.1 is irrational because it does not protect "innocent" minors but only "criminal" ones. To the contrary, the rights of an intoxicated ("criminal") minor are no greater than those of a nonintoxicated ("innocent") minor since in every case where the former could recover so could the latter. For example, if an intoxicated minor injures a nonintoxicated minor, *both* would have a cause of action under section 25602.1 against the negligent provider of the alcohol.

Appellants also contend that section 25602.1 is irrational because it was enacted for "the protection of people under twenty-one" yet would deny their 20-year-old son a cause of action. Jur. Stmt. at 18. Appellants misstate the legislative purpose. Section 25602.1 was not designed to protect young people generally but specifically *to deter the service of alcohol to minors.* Toward this end, the legislature authorized civil suits, by adults and minors alike, against persons who serve alcohol to obviously intoxicated minors. To permit civil suits against persons who serve *adults* (as appellees did here) would in no way further the legislative goal of preventing service to minors.

Finally, appellants suggest section 25602.1 is irrational because a statute imposing liability on the provider of alcohol in all cases, rather than only in cases where alcohol is served to an obviously intoxicated minor, would be *fairer* and would have the salutary effect of reducing *more* alcohol-related injuries. Appellants' argument should be addressed to the legislature, not to the courts. "[I]t is

up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981).

D. Statutes Containing Limitations On Dram Shop Liability Similar To Those Challenged Here Have Consistently Withstood Attack Under The Equal Protection Clause. There Is No Split Of Authority Among The States Requiring Resolution By This Court.

There appears to be no dispute among the states regarding the constitutionality of liability limitations similar to those at issue here. The courts agree such limitations are constitutional. We know of no case where a dram shop act which conditioned a plaintiff's ability to bring suit on the identity of either the intoxicated person or the plaintiff was held to violate the equal protection clause. To the contrary, the courts have uniformly concluded that statutes such as California's satisfy the rational basis test.

For example, in *Barnes v. B.K. Credit Serv., Inc.*, 461 So.2d 217 (Fla.App.1984), the Florida Court of Appeal upheld a statute which codified the traditional common law rule of immunity but created an exception where liquor was served to a minor or a person habitually addicted to alcohol. The court explained the statute was rational because the legislature "was doubtless furthering the ultimate legitimate interest of safeguarding from harm one of immaturity imbibing intoxicants. . . . Whether it would have been wiser for the legislature to also include under its protection obviously intoxicated adults is not an issue we may resolve." *Id.* at 219-20.

In *Roy v. Rau Tavern, Inc.*, 167 Mich.App. 664, 423 N.W.2d 54 (1988), the Michigan Court of Appeal upheld

a statute which prevented the family of an intoxicated person from bringing suit for loss of support or companionship while permitting such a suit by the parents of a person harmed by an intoxicated person. The court rejected the plaintiffs' equal protection challenge, reasoning that "[t]he amendment was designed to deal with the numerous cases which were creating a liability crisis for tavern and restaurant owners. Barring family members of a visibly intoxicated person from maintaining suit was one way in which this crisis could be lessened." *Id.* at 668, 423 N.W.2d at 57; *accord Glinka v. The Flame Of The Countryside, Inc.*, 171 Ill.App.3d 81, 524 N.E.2d 1102 (1988); *see also Simpson v. Kilcher*, 749 S.W.2d 386, 392 (Mo. 1988) [upholding statute permitting liability only if liquor licensee is *convicted* of selling alcohol to minor or obviously intoxicated person; the legislature was entitled to make "a policy decision to place responsibility for these accidents on the drunk driver" and to confine liability "to those cases where conduct is so flagrant it becomes objectively provable by criminal conviction," thereby preventing lawsuits every time a tavern patron causes injury]; *cf. Linnabery v. DePauw*, 695 F.Supp. 411 (C.D. Ill. 1988) [limitation of Illinois dram shop act to accidents occurring within the state is constitutional].

These courts, like the California Supreme Court, recognized that the legislature may limit the class of persons who may bring suit as long as there is a rational basis for the limitation. The legal principles governing such cases are well established and need no further explication by this Court. Appellants' equal protection claims fail to raise a substantial federal question, and their appeal should be summarily dismissed.

II.

APPELLANTS' DUE PROCESS CLAIM FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION

Appellants claim California Business and Professions Code section 25602(c) and Civil Code section 1714(b) violate the due process clauses of the Fifth and Fourteenth Amendments. They invoke the moribund "irrebuttable presumption" doctrine. *See* Jur. Stmt. at 31-38. According to appellants, the statutes in question "conclusively presume that service of alcohol cannot cause subsequent injuries to third parties." *Id.* at 32. Since the so-called presumption is not "universally true," appellants argue, they must be afforded an opportunity to litigate the issue of causation. *Id.* at 33, 35-36.

Appellants' argument borders on the frivolous. They misapply both the due process clause and the irrebuttable presumption doctrine. Moreover, they misread the legislation in question, which presumes nothing about "causation" or about any other fact. Appellants' due process claim, therefore, does not merit attention by this Court.

A. The Due Process Clause Is Inapplicable Because The 1978 Amendments Do Not Deprive Appellants Of "Life, Liberty, Or Property."

The due process clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const., amend. XIV. Where a legislative enactment works no deprivation of "life, liberty, or property," the enactment cannot violate the due process clause. *See Board of Regents v. Roth,* 408 U.S. 564, 569-70 (1972); *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

A person has no property interest in a tort claim for damages under state common law. *Duke Power Co.,* 438 U.S. at 88 n. 32 ["Our cases have clearly established that

'[a] person has no property, no vested interest, in any rule of the common law.' "]; *New York Central R.R. Co. v. White,* 243 U.S. 188, 198 (1917) ["No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."]; *Ducharme v. Merrill-National Laboratories,* 574 F.2d 1307, 1309 (5th Cir.), *cert. denied,* 439 U.S. 1002 (1978) ["It is well settled that a plaintiff has no vested right in any tort claim for damages under state law."]; *Morris v. Hotel Riviera, Inc.,* 704 F.2d at 1114 ["[A]n individual has no vested interest in a common law rule."]; *Lamb v. Volkswagenwerk Aktiengesellschaft,* 631 F. Supp. 1144, 1149 (S.D. Fla. 1986) [party who was "merely pursuing a common law tort theory to recover damages" had no vested property right]; *see Hammond v. United States,* 786 F.2d 8, 12 (1st Cir. 1986) [rights in tort do not vest until a final judgment has been entered].

Since no one has a property interest in a common law tort claim, legislation which limits, or even abolishes, such a claim cannot violate the due process clause. *See, e.g., Duke Power Co.,* 438 U.S. at 88 [rejecting due process challenge to federal legislation limiting liability for nuclear accidents]; *Silver v. Silver,* 280 U.S. 117 (1929) [upholding abolition of guest-passenger's cause of action for negligence against host-driver]; *Carr v. United States,* 422 F.2d 1007 (4th Cir. 1970) [upholding legislation which abrogated federal employee's cause of action against fellow employee]; see *Brady v. Roosevelt Steamship Co.,* 317 U.S. 575 (1943) [recognizing congressional power to grant immunity from tort liability to private operators of government vessels].

The legislation at issue here, enacted seven years *before* the death of appellants' son, simply abrogated a court-

created rule which appellants would now like to invoke. The legislation reinstated the former, longstanding common law rule that servers of alcohol are not liable for injuries inflicted by the consumers of the alcohol. Appellants had no vested interest in the short-lived rule of liability entitling them to insist that it remain unchanged. Thus, the legislation abrogating that rule deprived appellants of neither life, liberty, nor property. The due process clause is inapplicable in this case.

B. Appellants' Irrebuttable Presumption Argument Rests On A Misreading Of The Statutes At Issue, Which Simply Confer Civil Immunity On A Defined Class Of Persons. The Statutes Contain No Presumptions Concerning Lack Of "Causation" Or Any Other Fact.

The irrebuttable presumption doctrine formed the basis for the ruling in a handful of cases decided by this Court more than a decade ago. *See Stanley v. Illinois,* 405 U.S. 645 (1972); *Vlandis v. Kline,* 412 U.S. 441 (1973); *United States Dep't of Agriculture v. Murry,* 413 U.S. 508 (1973); *Cleveland Bd. of Education v. LaFleur,* 414 U.S. 632 (1974). The Court relied on this doctrine to invalidate several legislative schemes which imposed a burden on persons in a defined class yet denied such persons an opportunity to show, as a factual matter, that they did not belong in the class.

In *Stanley,* for example, the Court invalidated a legislative scheme under which the state took custody of an illegitimate child following the death of the child's mother. *See Stanley,* 405 U.S. at 649, 656-58. The father of such a child was afforded no hearing on the question of his fitness as a parent. The Court held the legislation violated due process by conclusively presuming that all unmarried

fathers are unqualified to raise their children. Since this factual presumption is not true in all cases, the due process clause required the state to provide a hearing on the issue of parental fitness. *Id.*

In *Vlandis,* the Court struck down a college tuition system which imposed higher rates on nonresidents and conclusively presumed an applicant to be a nonresident if his legal address was outside the state at the time of application. *See Vlandis,* 412 U.S. at 452. Because the statutory presumption was "not necessarily or universally true in fact," due process required the state to allow the applicant "the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates." *Id.*

Similarly, in *LaFleur,* the Court considered the rules of two school boards which required every pregnant teacher to take an unpaid leave of absence commencing five months and four months, respectively, before the expected birth of the child. The Court invalidated the rules under the due process clause because they conclusively presumed physical incapacity at a point during pregnancy when some teachers would not be incapacitated. *LaFleur,* 414 U.S. at 647-48. Like the factual presumption of unfitness in *Stanley* and nonresidency in *Vlandis,* the presumption of incapacity in *LaFleur* was "neither 'necessarily [nor] universally true.' " *Id.* at 646. The Court indicated that an individualized determination of incapacity would have satisfied the requirements of due process. *Id.* at 647 & n. 13.

The irrebuttable presumption cases "actually rest[ed] on an equal protection rationale, for the objectionable portion of each law was the way in which it classified individuals." 2 Rotunda, Nowak & Young, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.6, at 246 (1986) (footnote omitted). For this reason, the Court later

retreated from the irrebuttable presumption doctrine, limiting it to situations in which a state expressly purports to be concerned with a defined characteristic (parental fitness in *Stanley,* residency in *Vlandis,* physical incapacity in *LaFleur*) yet at the same time denies any opportunity for an individual to show factors bearing on that characteristic. *See Weinberger v. Salfi,* 422 U.S. 749, 767-74 (1975); *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 22-24 (1976); *Elkins v. Moreno,* 435 U.S. 647, 660 (1978); *United States v. Locke,* 471 U.S. 84, 103 (1985); *see also id.* at 110 (O'Connor, J., concurring) [questioning whether *Vlandis* has any force "beyond the facts underlying that case"].

Where legislation does not purport to be concerned with any particular characteristic but simply imposes a benefit or a burden on a defined group for a legitimate legislative purpose, the irrebuttable presumption doctrine is simply inapplicable. The appropriate framework for analysis is the equal protection clause, and the pertinent inquiry is whether, considering the legislative goal, the group has been defined arbitrarily or irrationally. *See Salfi,* 422 U.S. at 767-74; *Mourning v. Family Publications Service,* 411 U.S. 356, 377 (1973).

Appellants' effort to invoke the irrebuttable presumption doctrine in this case is fundamentally misguided. To begin with, appellants misread the statutes at issue. The statutes do not presume "the service of alcohol cannot cause injury to a third party," Jur. Stmt. at ii. On the contrary, the legislation expressly acknowledges service of alcohol *can* cause injuries to third parties—the legislation grants civil immunity "*for injuries inflicted* on that [third party]." Cal. Bus. & Prof. Code § 25602(b). The legislature granted civil immunity to servers of alcohol precisely *because* service of alcohol can and does cause injury to

third parties yet social policy dictates that such injury not give rise to civil liability.

Further, contrary to appellants' erroneous reading, the statutes they challenge do not even address the subject of "causation," much less presume anything about it. The statutes refer only to "proximate causation."[10] This distinction is important because, in California, "causation" is a matter of fact, while "proximate causation" is a matter of law. *See Valdez v. J.D. Diffenbaugh Co.*, 51 Cal. App.3d 494, 509, 124 Cal. Rptr. 467, 477 (1975) [proximate causation "is not a question of causation; it is simply a policy determination of whether or not the defendant should be held responsible for his acts"].

The rule that service of alcoholic beverages is not the proximate cause of injuries inflicted by the consumer originated in the common law. *See Lammers v. Pacific Electric Ry. Co.*, 186 Cal. 379, 384, 199 P. 523, 525 (1921); *Cole v. Rush*, 45 Cal.2d 345, 348, 289 P.2d 450, 452 (1955). The

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[10]California Business and Professions Code section 25602(c) states the legislature intended to abrogate the holdings in certain recent court decisions "in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the *proximate cause* of injuries inflicted upon another by an intoxicated person." Cal. Bus. & Prof. Code § 25602(c) (West 1985) (emphasis added).

Likewise, Civil Code section 1714(b) merely declares the legislature's intent "to reinstate the prior judicial interpretation of this section as it relates to *proximate cause* for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the *proximate cause* of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the *proximate cause* of injuries inflicted upon another by an intoxicated person." Cal. Civil Code § 1714(b) (West 1985) (emphasis added.

courts that announced this rule were not presuming anything but rather holding, as a matter of law, that servers of alcohol cannot be liable to third parties. In sections 25602(c) and 1714(b), the legislature simply endorsed those holdings, and abrogated more recent court decisions to the contrary. The statutes presume no facts.

In addition to misreading the statutes at issue, appellants fail to recognize that the irrebuttable presumption doctrine is inapplicable where, as here, there is no claim of legislative misclassification. Unlike the aggrieved parties in *Stanley, Vlandis,* and *LaFleur,* appellants identify no class in which they claim to have been wrongly included or excluded. Nor do appellants identify any presumed fact which, if rebutted, would place them in the narrow class of persons entitled to maintain tort actions against appellees.

Appellants assert the statutes conclusively presume "that the service of alcohol cannot cause injury to a third party." Jur. Stmt. at ii. Even if this reading of the statutes were correct (we have explained above why it is incorrect), rebuttal of the presumption would not benefit appellants in the least. Under section 25602(b), appellees' civil immunity does not depend on whether their conduct did or did not cause injury to appellants. Section 25602(b) states: "No person who sells . . . any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of the intoxication by the consumer of such alcoholic beverage." Cal. Bus. & Prof. Code §25602(b) (West 1985). Thus, the factual question whether appellees' conduct did or did not cause injury is immaterial; appellees are immune from

civil liability in either case. Unlike the aggrieved parties in *Stanley, Vlandis,* and *LaFleur,* appellants here could not possibly benefit from an opportunity to present additional facts.[11]

In summary, appellants' irrebuttable presumption argument rests on a gross misreading of the statutes in question. Contrary to appellants' assertion, those statutes contain no presumptions concerning lack of causation or any other fact. The statutes refer to "proximate causation," which is a matter of law not fact. Appellants do not claim to have been wrongly included in, or excluded from, any statutory class, nor do they identify any fact which, if rebutted, would enable them to maintain their action against appellees. The irrebuttable presumption doctrine is therefore inapplicable in this case. Appellants' argument to the contrary borders on the frivolous and does not merit this Court's attention.

—o—

CONCLUSION

For the foregoing reasons, appellees respectfully request that this Court summarily affirm the judgment of the Court of Appeal of California or, in the alternative, dismiss the appeal for want of a substantial federal question.

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[11]Appellants do not seek a hearing to prove that they have been wrongly excluded from the class of those entitled to maintain tort actions (obviously intoxicated minors and their victims). Rather, appellants challenge the legislature's decision to *define* that class as it did. Although appellants invoke the jargon of due process and irrebuttable presumptions, their claim is a garden variety equal protection challenge and should be analyzed accordingly.

Respectfully submitted,

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APPENDIX

SENATE COMMITTEE ON JUDICIARY

BACKGROUND INFORMATION

SB 1645

1. *Source*

(a) What group, organization, governmental agency, or other person, if any, requested the introduction of the bill? Please list the requestor's telephone number or, if unavailable, his address.

John Patrick Kearney, Pres., United Spirits Association, 596 No. Arrowhead Avenue, San Bernardino 92401 phone (714) 372-5519.

(b) Which groups, organizations, or governmental agencies have contacted you in support of, or in opposition to, your bill?

William M. Sheroff, Attorney, Claremont (714) 621-4935—opposes

(c) If a similar bill has been introduced at a previous session of the Legislature, what was its number and the year of its introduction?

AB 1990 & SB 1176 - 1977

2. *Purpose*

What problem or deficiency under existing law does the bill seek to remedy?

The California courts have recently interpreted existing law as imposing civil liability upon persons who sell, furnish, give or cause to be given alcoholic beverages to an intoxicated person when such person inflicts injury upon a third party. SB 1645 would specifically prohibit the imposition of civil liability in such instance.

See attached copy of press release

If you have any further background information or material relating to the bill, please enclose a copy of it or state where the information or material is available.

PLEASE COMPLETE THIS FORM AND RETURN IT TO THE SENATE COMMITTEE ON JUDICIARY, ROOM 2046 AS SOON AS POSSIBLE. THE COMMITTEE STAFF CANNOT SET THE BILL FOR A HEARING UNTIL THIS FORM HAS BEEN RETURNED.

From the office of
RUBEN S. AYALA
Senator, 32nd District
Room 2048
State Capitol

For Immediate Release

March 10, 1978

ALCOHOLIC BEVERAGE LIABILITY

Legislation has been introduced by Senator Ruben S. Ayala (D-Chino) to change the law dealing with alcoholic beverage liability, it was announced today.

"The California courts have recently interpreted existing law as imposing civil liability upon persons who sell, furnish, give or cause to be given alcoholic beverages to an intoxicated person when such person inflicts injury upon a third party," said Senator Ayala. "SB 1645 would specifically prohibit the imposition of civil liability in such instance. It would also state a legislative intent that prior judicial interpretation be reinstated so that such civil liability to a third party is incurred solely by the consumer of alcoholic beverages.

"I believe that every person is responsible for his or her willful acts and for any injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person," continued the Senator, "and I think it is time for the courts to recognize this."

END

SENATE DEMOCRATIC CAUCUS

SENATOR OMER L. RAINS, *Chairman*

Bill No. SB1645(As Amended:5-17-78)

Author: Ayala (D)

Subject: Alcoholic Beverage Liability: Proximate Cause

Policy Committee: Judiciary

Ayes (5) Beverly, Dennis Carpenter, Robbins, Deukmejian, Song

Noes (2) Sieroty, Wilson

Assembly Floor Vote: ——AYES ——NOES.

Summary of Legislation:

The California courts have recently interpreted existing law as imposing civil liability upon persons who sell, furnish, give or cause to be given alcoholic beverages to an intoxicated person when such person inflicts injury upon a third party.

This bill specifically prohibits the imposition of civil liability in such instances.

This bill also states a legislative declaration that prior judicial interpretation be reinstated so that such civil liability to any injured person or the estate of such person is incurred solely by the intoxicated person.

This bill also specifies that social hosts who furnish alcoholic beverages shall not be held legally accountable for damages by such person, or for injury to the property of, or death of, any third person, resulting from the consumption of such beverages.

Fiscal Effect:

None

Proponents:

United Spirits Association (sponsor)

San Pedro Chamber of Community Development and Commerce

California State University and Colleges Student Presidents Association

Bowling Properties Association of California

Veterans of Foreign Wars

Native Sons of the Golden West

American Legion

Tom Lazio Fish Company, Inc.

Moose Club

Opponents:

California Trial Lawyers Association

Arguments in Support:

Proponents argue that a person who drinks should be responsible for his or her willful acts. They also argue that recent court decisions making furnishers civilly liable have caused insurance premiums for tavern owners to skyrocket.

Arguments in Opposition:

Opponents argue that a furnisher's liability will cause him/her to be more careful in serving drinks to obviously intoxicated persons and thus promote the public safety.

Senate Bill 1645—An act to amend Section 25602 of the Business and Professions Code, and to amend Section 1714 of the Civil Code, relating to proximate cause.

Bill read third time.

The roll was called and the bill passed by the following vote:

AYES (27)—Senators Alquist, Ayala, Behr, Beverly, Campbell, Dennis Carpenter, Paul Carpenter, Cusanovich, Deukmejian, Dills, Dunlap, Foran, Garamendi, Greene, Marks, Mills, Nimmo, Presley, Rains, Richardson, Roberti, Rodda, Russell, Smith, Song, Stull, and Zenovich.

NOES (5)—Senators Gregorio, Hohndahl, Sieroty, Stiern, and Wilson.

Bill ordered transmitted to the Assembly.

5-24-78 *p. 11166*

SENATE COMMITTEE ON JUDICIARY
1977-78 REGULAR SESSION

SB 1645 (Ayala) S
As introduced B
Civil, Business & Professions Code —

DRAMSHOP ACT 1
—LIABILITY OF FURNISHERS OF LIQUOR— 6
4
5

HISTORY

Source: United Spirits Assn.
Prior Legislation: None
Support: Unknown
Opposition: Individuals, C.T.L.A.

PURPOSE

Under Business & Professions Code Section 25602 it is a misdemeanor for a person to sell, furnish or give away any alcoholic beverage to any obviously intoxicated person. Case law has made a violation of this provision the basis of civil liability for injuries caused to a third person by the intoxicated person.

This bill would exempt all furnishers of liquor from civil liability for injuries caused to a third person by an intoxicated person. It would also specifically abrogate existing judicial interpretations of the Dramshop Act.

The purpose of the bill is to exempt liquor sellers and furnishers from third party liability.

COMMENT

1. *Statement of legislative intent*

In *Vesely v. Sager* (1971) 5 C. 3d 153, the California Supreme Court stated that Section 25602 of the Busi-

ness & Professions Code (the dramshop provision) was enacted "for the purpose of protecting members of the general public from injuries to person and danger to property resulting from excessive use of intoxicating liquor."

SB 1645 would state the legislative intent that Section 25602 be interpreted to abrogate holdings in *Vesely* and *Bernhardt v. Harrah's Club* (1976) 16 C 3d 313 and to reinstate prior judicial interpretations of that section which found that it is the consumption, not the furnishing, of liquor which is the *proximate cause* of the alleged injuries to third persons.

HOW WOULD THE BILL AFFECT CASES WHICH ARE PRESENTLY IN LITIGATION AND ARE NOT DECIDED BEFORE JANUARY 1, 1979, AND CAUSES OF ACTION ARISING BEFORE THAT DATE?

2. *Exemption of liquor furnishers/sellers*

Violations of current Section 25602 have been successfully used by injured parties to recover from tavern owners or other persons who furnish liquors to the persons who caused such injuries. [*Vesely v. Sager, supra,* tavern owner liable; *Bernhardt v. Harrah's Club* (1976) 16 C 3d 313, Nevada tavern owner liable; *Brockett v. Kitchen Boyd Motor Co.* (1972 24 C 3d 87, employer who knowingly made liquor available to intoxicated minor liable; *Walters v. Sloan* (1975) 122 Cal. Rptr. 623, resident owner and daughter who furnished liquor to unsupervised minors liable.]

This bill would specifically prohibit the imposition of civil liability upon such persons, and would specify that the consumption, not the furnishing of liquors to a person would be the proximate cause of the injuries sustained by a third person.

Until *Vesely,* the latter doctrine was case law in California (Cf. *Cole v. Rush* (1955) 45 C. 2d 345 and *Fleckner v. Dionne* (1949) 94 C.A. 2d 246). In the *Cole* and *Fleckner* cases, the courts held that no lia-

bility on the part of the liquor furnisher existed because for a competent person it is the *voluntary* consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use.

However, in several cases before Vesely, the courts suggested that the *Fleckner* and *Cole* cases were based on "outmoded reasoning" and might be "ripe for disapproval." Thus, in *Thomas v. Bruza* (1957) 151 C.A. 2d, the court recognized that a bar keeper, like a restaurateur or other person whose premises are open to the public, owes a duty to invitees to exercise reasonable care in maintaining order for their safety. Thus, if liquor is knowingly furnished to a person dangerous when drunk, and the latter injures a peaceful guest, an action will lie.

Vesely and *Bernhardt* are extensions of the court's logic in *Thomas v. Bruza.*

3. *No effect on non-liability to intoxicated persons*

This bill would not affect existing case law which has generally denied the intoxicated person and/or his heirs any recovery against a person in violation of Section 25602 (Cf. *Cooper v. National R.R. Passenger Corp.* (1975) 45 C.A. 3d 389; *Carlisle v. Kanaywer* (1972) 24 C.A. 3d 587; and *Venzor v. Santa Barbara Elks Lodge, No. 613* (1976) 56 C.A. 3d 209).

4. *Conflicting approach*

SB 1175 (Foran) would create the statutory liability of licensed furnishers of liquor, and restrict that liability with a 1-year statute of limitations and a provision that the intoxicated person had no cause of action. It would also exempt from liability the non-licensed furnisher of liquor. The bill is currently in the Assembly Judiciary Committee.

5. *Rising insurance costs*

The application of Section 26502 in civil cases has caused insurance premiums to skyrocket, according to one proponent from $35,000/year to $160,000/year for tavern owners.

POSITIONS As of Original Version

SOURCE: United Spirits Association

SUPPORT: San Pedro Chamber of Community Development & Commerce; Calif. State Univ. & Coll. Student Presidents Assn.; Tom Lazio Fish Co., Inc.

OPPOSED: C.T.L.A.; Dept. of Alcoholic Beverage Control

DATE TYPED: 5-17-78

BILL NUMBERED: SB 1645

AUTHOR: Ayala, etal

AMENDED COPY: 5-17-78

Committee Votes: Senate Floor Vote:

COMMITTEE: JUDICIARY

BILL NUMBER: SB 1645
Date of Hearing: 5-9-78

Senators:	AYE	NO
Beverly	✓	
D. Carpenter	✓	
Robbins	✓	
Roberti		
Sieroty		✓
Wilson		✓
Zenovich		
Deukmejian (V.C.)	✓	
Song (Chairman)	✓	
Total	5	2

Assembly Floor Vote:

DIGEST

Provides that a person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic

beverage to an intoxicated person is not to be civilly liable to any injured person or the estate of such person as a result of intoxication by the consumer of such alcoholic beverage.

This bill also states a legislative intent that prior judicial interpretation be reinstated so that such civil liability to a third party is incurred solely by the intoxicated person.

Provides that no social host who furnishes alcoholic beverages to any person is to be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages.

FISCAL EFFECT:

Appropriation: No. Fiscal Committee: No. Local: No.

COMMENTS:

Under Business & Professions Code Section 25602 it is a misdemeanor for a person to sell, furnish or give away any alcoholic beverage to any obviously intoxicated person. Case law has made a violation of this provision on the basis of civil liability for injuries caused to a third person by the intoxicated person.

In *Vesely v. Sager* (1971), 5 C. 3d 153, the California Supreme Court stated that Section 25602 of the Business and Professions Code (the dramshop provision) was enacted "for the purpose of protecting members of the general public from injuries to persons and danger to property resulting from excessive use of intoxicating liquor."

Social hosts

The California Supreme Court just handed down its decision in the case of *Coulter v. Superior Court of San*

Mateo County (*Schwartz v. Reynolds & Co., real parties in interest*), on April 26, 1978. In that case the court concluded that a social host who furnishes alcoholic beverages to an obviously intoxicated person, under circumstances which create a reasonably foreseeable risk of harm to others, may be held legally accountable to those third persons who are injured when that harm occurs.

SB 1645 would state the legislative intent that Section 25602 be interpreted to abrogate holdings in *Vesely, Coulter* and *Bernhardt v. Harrah's Club* (1976) 16 C. 3d 313 and to reinstate prior judicial interpretations of that section which found that it is the consumption, not the furnishing, of liquor which is the *proximate cause* of the alleged injuries to third persons.

Exemption of liquor furnishers/sellers

Violations of current Section 25602 have been successfully used by injured parties to recover from tavern owners or other persons who furnish liquors to the persons who caused such injuries. (*Vesely v. Sager, supra,* tavern owner liability; *Bernhardt v. Harrah's Club* (1976) 16 C. 3d 313, Nevada tavern owner liable; *Brockett v. Kitchen Boyd Motor Co.* (1972) 14 C. 3d 87, employer who knowingly made liquor available to intoxicated minor liable; *Walters v. Sloan* (1975) 122 Cal. Rptr. 623, resident owner and daughter who furnished liquor to unsupervised minors liable; *Coulter v. Superior Court* (1978) 20 C. 3d ——, apartment owner who permitted service liquor to party guest liable).

Until *Vesely,* the latter doctrine was case law in California (Cf. *Cole v. Rush* (1955) 45 C. 2d 345 and *Fleckner v. Dionne* (1949) 94 C.A. 2d 246). In the *Cole* and *Fleck-*

ner cases, the courts held that no liability on the part of the liquor furnisher existed because for a competent person it is the *voluntary* consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use.

However, in several cases before Vesely, the courts suggested that the *Fleckner* and *Cole* cases were based on "outmoded reasoning" and might be "ripe for disapproval." Thus, in *Thomas v. Bruze* (1957) 151 C.A. 2d, the court recognized that a bar keeper, like a restaurateur or other person whose premises are open to the public, owes a duty to invitees to exercise reasonable care in maintaining order for their safety. Thus, if liquor is knowingly furnished to a person dangerous when drunk, and the latter injures a peaceful guest, an action will lie. *Vesely* and *Bernhardt* and *Coulter* are extensions of the court's logic in *Thomas v. Bruze.*

Rising insurance costs

The application of Section 26502 in civil cases has caused insurance premiums to skyrocket, according to one proponent from $35,000/year to $160,000/year for tavern owners.

Senate Coauthors: Behr, D. Carpenter, Greene and Russell

Assembly Coauthors: Lewis, Bane, Chimbole, Cline, Montoya, Statham, V. Thomas, Thurman, N. Waters and Wornum

UNITED SPIRITS ASSOCIATION
P.O. Box 1552, San Bernardino, CA 92401

(714) 884-3248

President: J. P. (Jack) Kearney
Vice-President: Don Knight

Secretary: A.M. (Al) Austi
Treasurer: Nena Negrete

April 7, 1978

Honorable Ruben S. Ayala
State Senator
Room 2048 State Capitol
Sacramento, California 95814

RE: SB 1645

Dear Ruben,

Thank you for sending me a copy of Shernoff's letter of March 15, 1978 in opposition to SB 1645. I will respond to his arguments in the order presented by him.

Shernoff states that *Vesely v. Sager* is a landmark case handled by Herb Hafif. He is correct that *Vesely* is a landmark case but that doesn't make it good law. It was a good case for Herb who will remember the adage, GOOD CASES MAKE BAD LAW. To learn that it was Herb's case only helps to explain the activity of the California Trial Lawyers in opposition to our efforts toward legislative repeal of *Vesely*. Herb Hafif is a former President of the C.T.L.A.

Shernoff correctly states that SB 1645 would immunize bartenders from civil liability for consequences of their conduct in serving obviously intoxicated persons. Prior to the *Vesely* case (1971) the law in California and in most other states held that liability for the consequences of intoxicated behavior was imposed on the drink-

er not the server of alcoholic beverages. The California Democratic Party expressed our position well by a Resolution passed in convention in Anaheim in December, 1977:

> WHEREAS the California Supreme Court has imposed civil liability for damages arising out of the actions of an intoxicated person upon the furnisher of alcoholic beverages, and
>
> WHEREAS those who abuse the use of alcohol should be responsible for their own intoxicated behavior, and
>
> WHEREAS the dilution of responsibility for intoxicated behavior will tend to encourage its abuse.
>
> NOW THEREFORE BE IT RESOLVED
> That the Democratic Party of the State of California believes that the drinker of alcoholic beverages, not the furnisher thereof, should be liable for negligent acts arising out of his abuse of alcohol, that it is opposed to Dram Shop Liability Law and supports legislative repeal of third party liquor liability.

SB 1645 will also immunize homeowners, employers and political and charitable organizations from civil liability for consequences of their conduct in serving obviously intoxicated persons.

Bartenders and waitresses are far less likely to serve drunks than untrained, unregulated homeowners or politicians. Every bartender and waitress knows that he is liable to a $500.00 fine and a six (6) month jail term for serving an obviously intoxicated person. He needs no additional civil liability for being his customer's keeper to encourage compliance with the criminal law.

The owners of restaurants and bars and liquor stores are regulated by the California Alcoholic Beverage Control and ABC Licensees know that they are subject to

fines, suspensions and, ultimately, revocation of their license if they or their employees serve intoxicated persons. They need not be subjected to law suits which are impossible to defend to motivate them to take care of their business investment.

Shernoff believes that, "Serving liquor is a privilege in this State." We submit that serving liquor is no more a privilege than selling ice cream, practicing law or engaging in any other business activity.

He suggests that insurance would not be available to take care of innocent victims of drunk drivers if your SB 1645 became law. His position is false. Insurance was available before the *Vesely* decision, it has been ever since and will continue to be after we have returned the civil responsibility for the abuse of alcohol back to the drinkers who abuse it. Where a drunk driver proximately causes injury to another his liability insurance carrier responds in damages. If the drunk driver is not insured the uninsured motorist and medical pay coverages on the victim's car apply. If neither driver is insured the injured party is eligible for benefits under the Victims of Violent Crimes Act.

The *Vesely* case does not fill a need for insurance. It only added a new class of persons liable for damages—new customers for insurance companies and new target defendants for plaintiff lawyers.

Shernoff wants you to believe that "the welfare system" must pay the damages for innocent victims "through medi-cal, etc." if your bill passes. His statement might startle those taxpayers who prefer to pay revenue to insurance companies than to their government but it has no factual basis.

Shernoff demonstrates a lack of awareness of an important, revenue-producing industry when he suggests that those "who wish to indulge . . . certainly have the obligation to pay a few more cents for their drinks." The vast majority of ABC Licensees are not buying Liquor Liability Insurance because the enormous and continually escalating insurance premiums are prohibitively expensive. Restaurateurs generally prefer the potential risk of losing their business later to going broke now.

You will remember the Pirates Den, a modest little dinner house (maximum seating 160 people) in San Bernadino. In 1974 their liability insurance premium was $300.00 per year. In 1975—$800.00. In 1976—$1,600.00. In 1977—$3,700.00. The coverage offered to them for the year 1978 imposed a premium of $7,364.00. They had to decline the coverage or fold their business.

The enormous insurance premiums grow directly from the essential unfairness of liquor liability law. When a citizen has an accident he reports it to his insurance company which promptly investigates the matter. An ABC Licensee or a Homeowner might be served with a lawsuit six (6) months or a year after an accident occurred and have no way of proving whether or not the drivers were in his place of business much less proving that the party was not obviously intoxicated. Insurance carriers have responded to this extraordinary risk by charging extraordinary insurance premiums.

To impose civil liability for the serving of alcoholic beverages is to create a class of citizens who cannot defend themselves. And that's about as un-American as you can get.

Cordially,
/s/ Jack

JOHN PATRICK KEARNEY
Legal Counsel

JPK/ct
cc: Assemblyman Bill McVittie
California Dining and Beverage Association
Assemblyman Jerry Lewis
California Bowling Proprietors Association

P.S.

In your letter of March 8, 1978 you asked if I could come to Sacramento to testify when your bill is set for hearing. I want to do so and if my trial calendar permits and if you give me notice I can probably make it, if not, another USA member will appear.

CALIFORNIA STATE UNIVERSITY AND
COLLEGES STUDENT PRESIDENTS ASSOCIATION

. . . representing 310,000 students statewide

(Letterhead Names omitted in printing)

August 28, 1978

The Honorable Edmund G. Brown, Jr.
Governor of California
State Capitol Building
Sacramento, CA 95814

Dear Governor Brown:

The Student Presidents Association supports SB 1645 (Ayala) and requests your signature on this bill.

Liquor liability is becoming an enormous problem for not only sororities and fraternities, but also for individual students. Liquor liability insurance is so incredibly expensive that students have no protection.

The only affect the current liability laws have is to make third parties unreasonably liable for another person's mistake.

Thank you for your consideration of our position.

Sincerely yours,

/s/ Craig A. Jones
Craig A. Jones
Legislative Advocate

cj/cbk

CALIFORNIA CONFERENCE BOARD
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San Francisco—1225
San Francisco—1471
San Jose—265
Stockton—276

September 12, 1978

Governor Edmund G. Brown, Jr.
State Capitol
First Floor
Sacramento, California 95814

Dear Governor Brown:

It has been called to the attention of the Amalgamated Transit Union that SB 1645 (Ayala) has been transmitted to you by the Legislature for further action. We respectfully urge you to sign this measure.

The Amalgamated Transit Union is comprised of approximately 10,000 bus drivers and maintenance employees

who work and reside throughout California. While the majority of our members work for public transit districts, we do represent a significant number of employees who work for private carriers transporting passengers on a charter basis. It is not unusual for charter companies to permit the serving of alcoholic beverages to passengers while a bus is in route to its destination. For some time now, ATU has been concerned about how recent cases such as *Vesely v. Sager* and *Bernhard v. Harrah's Club* might impact upon the serving of alcoholic beverages on charter bus trips. Under the above referenced cases, it is possible that a bus company could be joined as a defendant if an intoxicated passenger disembarked from a bus which permitted the serving of alcoholic beverages and that intoxicated passenger thereafter injured a third person. This joinder would seem to be allowed even if the bus line operator did not directly operate the bar, but only allowed one to be operated by the chartering party.

It is ATU's position that cases such as *Vesely* and *Bernhard* have extended the scope of potential liability beyond reasonable limits. ATU believes that SB 1645 rightfully places the responsibility for injuries proximately caused by an intoxicated person upon the party actually at fault—the intoxicated person. It is simply not equitable to permit the erosion of well-established liability principles simply for the sake of finding solvent defendants.

An additional factor in ATU's request that you sign SB 1645 is the potential financial hardship that would befall bus carriers if they were hit by huge judgements (which would be especially bitter in view of the attenuated basis of liability as discussed above). It is no secret that bus line operators, public and private alike, are finding it

increasingly difficult to offer service at rates which make bus travel an affordable option.

Thank you for considering ATU's views on this important issue.

Sincerely,

AMALGAMATED TRANSIT UNION
/s/ Jerry Long
Jerry Long

JL:sg

California Chamber
of Commerce
455 Capitol Mall
P.O. Box 1736
Sacramento, CA
95808
(916) 444-6670

August 31, 1978

The Honorable Edmund G. Brown, Jr.
Governor
State of California
State Capitol
Sacramento, Ca 95814

RE: *SB 1645 (Ayala et al)*
Liquor Liability

Dear Governor Brown:

The California Chamber of Commerce respectfully urges your approval of SB 1645 to exempt licensee, bartender, social host, etc. from civil liability in the event of injury to a third party. It would make the intoxicated person solely responsible for his own actions.

The Chamber has supported this legislation from the beginning at the strong urging from our membership and chambers of commerce whose liability insurance premiums have increased 400% and more in several years time for bar, hotel, and restaurant owners as well as non-profit organizations who sponsor social functions.

Existing Business and Professions Code 25602 still allows a cause of action as a misdemeanor against every person who sells, furnishes, or gives alcoholic beverage to any habitual or common drunkard or any obviously intoxicated person.

Thank you for your consideration of our views.

Sincerely,

/s/ John T. Hay
Executive Vice President

JTH/sw
cc/ Chamber's Statewide Insurance and Employee Benefits Committee
Chambers of Commerce
Assemblyman Ayala

A-25

INSURANCE AGENTS AND BROKERS
LEGISLATIVE COUNCIL

1127 11th Street - Suite 518 - Sacramento, California 95814
(916) 446-1428
Legislative Counsel
John A. Norwood

September 13, 1978

Honorable Edmund G. Brown, Jr.
State Capitol
Sacramento, California 95814

Governor Brown:

The Insurance Agents and Brokers Legislative Council, an association which represents 98% of the property and casualty insurance producers in California, urges your support and signature on SB 1645 (Ayala).

Many of the individuals most directly effected by this legislation are, like our members, small and medium-sized businessmen. It is these individuals who have a difficult time keeping the doors of their business open due to the high cost of liquor liability insurance. SB 1645 will provide these businessmen with the relief they need to ensure that they remain our clients on these and other matters and continue to serve their communities.

Your consideration of this matter is greately appreciated.

Sincerely,

/s/ John A. Norwood
John A. Norwood
Legislative Advocate

JAN:sbn

(SEAL)

(916) 322-9309

BRIAN L. WALKUP
Legislative Counsel

State of California
Department of Insurance

700 L Street, 3rd Floor
Sacramento, CA 95814

DRAM SHOP INSURANCE

ISO Monoline Experience (i.e., does not include package policies).

1975 Premiums—$6 million-nationwide
$366 thousand-California

California rates went up on the average 150% from 1974- to 1975.

1975—Rate Schedules:

	1975 to Present	*Pre 1975*
1. Clubs	47¢ per $100 annual receipts	19¢ per $100 annual receipts
2. Package Stores and Retail, consumed off premises	32¢ per $100 annual receipts	13¢ per $100 annual receipts
3. Restaurants, taverns, hotels, motels, consumed on premises	79¢ per $100 annual receipts	32¢ per $100 annual receipts
4. Manufacturers, Wholesalers, Distributors	8¢ per $100 annual receipts	3¢ per $100 annual receipts
5. Temporary Licensees	Flat Fee $40 per policy period	Same
6. Owners or lessees of premises owned by others	Flat Fee per policy $7.50 for bodily injury, $2.50 for Property damage	$5.00 bodily injury $2.00 property damage

CALIFORNIA LICENSED BEVERAGE ASSOCIATION

Latham Square Building
508 - 16th Street Telephone (415) 451-2377
Oakland, California 94612

August 31, 1978

The Honorable Edmund G. Brown, Jr.
Governor of the State of California
State Capitol
Sacramento, CA 95814

Dear Governor Brown:

We of the California Licensed Beverage Association, representing 40,000 members of the Restaurant, Tavern and Bowling associations, are asking you to sign Senate Bill 1645, so we can be relieved of the terrible insurance burden now resting on our shoulders, and forcing some of the smaller businessmen out of the industry due to the high cost of insurance coverage.

Insurance premiums have doubled and in some cases, tripled, making it impossible in some instances, for the owners of the establishments to carry insurance. Needless to say, the Association does not approve of the businesses being without insurance.

We would like to see you continue as Governor of the State of California, and we do thank you for past favors favorable to our industry. We really need your support of Senate Bill 1645 and will appreciate all you can do to help us in our endeavor.

Very truly yours,
/s/ Abe Harris
Abe Harris
Executive Secretary

AH:sp

FILED
MAY 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH HOWE and DORIS LOUISE HOWE,
Appellants,

vs.

NORCHEK OF NEWPORT, INC., d/b/a
WOODY'S WHARF; ROBERT KINNEY,
Appellees.

APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT, DIVISION THREE

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

WILLIAM T. RINTALA
ROBERT A. REES*
SHARON OXBOROUGH

RINTALA, SMOOT, JAENICKE & BRUNSWICK

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Counsel for Appellants

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No. 88-1095

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Counsel for Appellants

*Counsel of Record

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SUMMARY OF ARGUMENT

The 1978 Amendments make the following distinctions:

(1) A drunken 20-year old can stumble into traffic and sue the bar that served him yet a child maimed by a drunken 21-year old cannot sue even if the bar committed a criminal act.

(2) A social host who serves alcohol to a guest with a mental inability to handle alcohol may be held liable whereas a bar that serves a patron with an identical mental disability, due to the patron's obvious intoxication, is immune.

(3) A jury may determine proximate causation where a party gives car keys to an obviously intoxicated driver but not where a bartender gives alcohol to an obviously intoxicated driver.

Appellees argue that these distinctions are rational and that, even if they appear unreasonable, they represent a legislative choice not subject to judicial second-guessing. Since Marbury v. Madison, 5 U.S. 137 (1803), however, this Court has had the power and responsibility to measure legislation against the U.S. Constitution. The 1978 Amendments, as applied in this case, deny equal protection and due process because they protect criminals, not victims of crimes, and they deny Appellants the opportunity to be heard on the issue of "proximate causation."

Appellees believe that a state may constitutionally immunize criminals from the civil consequences of their misconduct and that a state may

protect "obviously intoxicated" minors while increasing the risk of injury to innocent minors. Appellees ask this Court to blindly bless these positions. Alcohol-related injuries are a problem of nationwide significance. This case is before the Court on appeal; any decision will have precedential value. Appellees' position should be rejected. At a minimum, this Court should take a hard look at this case before accepting Appellees' position.

THE 1978 AMENDMENTS SHOULD BE REVIEWED UNDER A STRICT OR INTERMEDIATE SCRUTINY STANDARD BECAUSE THEY AFFECT FUNDAMENTAL, OR, AT LEAST, IMPORTANT RIGHTS

Appellees do not deny that public safety is a fundamental interest. Appellees assert, however, that the "1978 amendments do not affect or infringe any person's right to life."

[Motion to Dismiss or Affirm ("Mo. to Dis."), p.7, n.3.] This position ignores extensive documentation showing that drunk driving is a deadly problem in this country and that commercial providers of alcohol are a significant part of the problem. The 1978 Amendments severely and adversely affect public safety.

Even when viewed narrowly, the 1978 Amendments eliminate a common law cause of action which is a protectable property right. This Court has recently held "that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." [Logan v. Zimmerman Brush Company, 455 U.S. 422, 428 (1982); see also Martinez v. State of Cal., 444 U.S. 277, 281-282 (1980).]

Appellants assert under Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) that a cause of action is not a recognizable fundamental interest. The Price-Anderson Act, under review in Duke Power Co., provided for an aggregate liability limit in the event of a nuclear incident; it did not eliminate any cause of action. The Court in Duke Power held that this type of legislation was purely economic regulation.[1] The 1978 Amendments eliminate a class of suits; they are not merely economic in nature. Duke Power Co. does not apply.

---

[1] City of New Orleans v. Dukes, 427 U.S. 297, 303-304 (1976), also cited by Appellees is distinguishable because the challenged legislation there was solely "economic regulation." [Id.]

Whether the 1978 Amendments are viewed broadly or narrowly, they affect a fundamental interest. As such, defendants must show that the 1978 Amendments have been "precisely tailored to serve a compelling governmental interest." [Plyler v. Doe, 457 U.S. 202, 217 (1982).]

Alternatively, this Court has used a heightened level of scrutiny where challenged legislation infringes a right which may not be fundamental but is nonetheless considered to be important. [Plyler v. Doe, supra; City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439-442 (1985).] If not fundamental, public safety is at least important enough to justify intermediate scrutiny.

Where intermediate review is appropriate, as here, the objective served by a challenged classification must be "important" even if not "compelling." [See Reed v. Reed, 404 U.S. 71, 76-77 (1971).] Intermediate review also requires that the mechanisms used by the government "must be substantially related to achievement of [the] objectives" of the legislation. [Craig v. Boren, 429 U.S. 190, 197 (1976).]

Even under a rational basis test, the appellees must show that the legislation is reasonably designed to achieve a "legitimate state purpose." [Hooper v. Bernalillo County Assessor, 472 U.S. 612, 616 (1985).]

There is no compelling, important or even rational reason to promote the

economic interests of the liquor lobby over the general safety of the public. Immunizing criminals from the consequences of their misconduct is not reasonably designed to achieve this questionable objective. Nor is it even rational to attempt to "protect" obviously intoxicated minors, but not sober minors who are killed or injured by a drunk driver. The 1978 Amendments fail all three tests.

A STATE CANNOT CONSTITUTIONALLY GRANT CIVIL IMMUNITY FOR CRIMINAL MISCONDUCT

Appellees assert that numerous cases have affirmed the constitutionality of statutory tort immunities. [Mo. to Dis. at 9.] In none of the cases, however, does a court hold that immunizing a criminal from the civil consequences of his misconduct is a

legitimate exercise of legislative power. More importantly, in all of the cases cited by appellees, the immunized conduct had some positive value to society. In this case, however, the legislature has already proscribed Appellees' conduct because it hurts society.

Appellees' reliance on Duke Power Co. is misplaced. In Duke Power Co., the challenged legislation did not eliminate any cause of action but merely capped the total amount of economic exposure to be paid by the nuclear power industry, giving Congress the power to act in the event that the industry limit was insufficient. Victims were not left without a remedy.

Nor do the other cases cited by plaintiff hold that the state may grant

immunities to criminals. [In Vanderwater v. Hatch, 835 F.2d 239 (10th Cir. 1987), the challenged statute merely changed plaintiff's burden of proof from strict liability to negligence; in International Administrators v. Life Insurance Company, 753 F.2d 1373 (7th Cir. 1985), the court upheld legislation which was labelled an immunity but was in effect a privilege designed to promote the free flow of information to insurance companies; in Simpson v. United States, 652 F.2d 831 (9th Cir. 1981), the challenged statute was not an immunity but a declaration that land owners owed no duty of care to certain people using that property; in Corey v. Jones, 650 F.2d 803 (5th Cir. 1981), the Fifth Circuit without analysis

upheld the Georgia guest statute because this Court had not yet announced any guidelines with respect to the legitimacy of guest statutes, which do not immunize criminals.[2]

A victim should have a right to sue the criminal that caused his injury. [Calif. Civ. Code §§3520 and 3523, Jur. Stmt., p. 25.] There is a strong policy interest in assuring adequate compensation for innocent victims. The unsupported proposition that the state may immunize criminals is not rational and must be rejected.

Appellees' purported legislative objectives for the 1978 Amendments do

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[2] Appellees also cite Cory v. Shierloh, 29 Cal.3d 430 (1981) as authority that tort immunities are constitutional. Appellants have already demonstrated that Cory is distinguishable and not controlling. [Jur. Stmt., p. 14.]

not save them. The first proposed "rational basis" is that the 1978 Amendments encourage adults to take responsibility for any injury caused by their negligence or willful acts. [Mo. to Dis., p. 10.] The 1978 Amendments actually achieve the opposite result. Where a bartender serves an obviously intoxicated patron, he has engaged in criminal conduct yet the legislation frees him from any civil responsibility for subsequent injuries.

Second, appellees argue under Duke Power Co. that California may promote the liquor supply industry by lowering its collective cost of insurance. Duke Power Co., is inapposite. It concerned the nuclear power industry, which is subject to extensive and strict administrative controls. There is no

history of any physical injury as a result of a nuclear accident. Moreover, the Act there did not eliminate any cause of action and was designed to promote development of alternative sources of energy.

Widely available liquor does not have the same social utility as widely available energy. The physical injury wrought by drinking drivers is not hypothetical, but a proven fact. Thus, the comparison to Duke Power Co. fails.

Even if a strong liquor supply industry is considered more important than public safety, there is no evidence that the 1978 Amendments are rationally designed to achieve this goal. The evidence of economic injury set forth in Appellees' Appendix is anecdotal at best, not scientific. At

least 35 other states allow injured parties to sue a bar that serves an obviously intoxicated patron. [Sipes, "The Emergence Of Civil Liability For Dispensing Alcohol: A Comparative Study," 8 The Review of Litigation, 1, 31-51 (1988).] The liquor industry has survived in these jurisdictions. The notion that immunities for criminals are necessary for the continued existence of California's liquor supply industry is nonsense.

Third, appellants argue under Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935), that the state is not required to use every means available to attack a problem. In Semler, this Court held that the state may regulate one profession without regulating all professions.

A state cannot outlaw conduct in one part of a statute however, and promote the same conduct in a later part. Once a state decides to attack an evil, it must do so rationally. It defies logic to use expensive enforcement mechanisms such as administrative and criminal liability and forbid civil remedies which provide stronger, more effective enforcement.

Appellees cite cases from Florida, Michigan, Illinois and Missouri for the proposition that limitations on dram shop liability are constitutional. In three of those four states, however, the courts did not decide whether a state may immunize a criminal from the civil consequences of his acts.[3]

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[3] Michigan, Illinois and Missouri all allow an injured party to sue a bar that serves an obviously intoxicated patron.

Indeed, although all states make it a crime to serve an obviously intoxicated person, only five states, Florida, California, Louisiana, South Dakota, and Wisconsin, have statutorily removed such criminals from the class of dram shop defendants. [Sipes, supra.] This Court's decision in this case will be stare decisis in those five states.

More significantly, this case will decide a more far reaching issue: whether a state, under any circumstances, may immunize a criminal and deny a civil remedy to his victim.

A CAUSE OF ACTION IS A DUE PROCESS PROPERTY INTEREST

Appellees rely on Duke Power Co. for the proposition that legislation which limits or abolishes a cause of action cannot violate the due process clause.

Duke Power Co., however, is distinguishable because it involved purely economic legislation whereas the 1978 Amendments threaten public safety, a due process interest. Moreover, under Logan and Martinez, a tort claim is a species of property protected by the due process clause.

THE 1978 AMENDMENTS TREAT PROXIMATE CAUSATION AS AN ISSUE OF FACT NOT LAW

Appellees suggest that the irrebuttable presumption doctrine is narrow or disfavored.[4] This Court noted, however, in Elkins v. Moreno, 435 U.S. 647, 648 (1978) that the doctrine is still viable.

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[4] Even if the irrebuttable presumption issues are analyzed as a species of equal protection, appellants have demonstrated that the 1978 Amendments as applied in this case do not pass constitutional muster.

The doctrine applies in this case because the state purports to be concerned with the existence of "proximate causation," yet at the same time denies any opportunity for Appellants to introduce evidence bearing on the determination of that fact.

Appellees assert that the phrase "proximate causation" as used in the 1978 Amendments refers to a legal conclusion, not a factual determination. Appellants' only authority, Valdez v. J.D. Diffenbaugh Co., 51 Cal.App.3d 494 (1975), is inapt because the court there confused the concepts of duty and proximate causation. [Jur. Stmt. pp. 36-37.]

Proximate causation has always been regarded as a question of fact for the

jury. [See Gomez v. Ticor, 145 Cal.App.3d 622, 627 (1983).] Specifically, in the context of liability for service of alcohol, the California Supreme Court, in Ewing v. Cloverleaf Bowl, 20 Cal. 3d 389, 399 (1978), has held that causality is an issue of fact to be resolved by a jury. [The legislature had an opportunity to overrule Ewing when enacting the 1978 Amendments and did not do so.]

The best evidence that the 1978 Amendments treat "proximate causation" as a fact issue comes from the legislation itself. Bus. & Prof. Code §25602.1 states that any plaintiff pursuing recovery under the narrow exception to the immunity must prove that the "furnishing of alcoholic beverage" is the proximate cause of the

personal injury or death sustained by such person, thus making proximate causation a factual issue.

CONCLUSION

For the foregoing reasons Appellants respectfully request that this Court should note probable jurisdiction of this appeal, or, in the alternative, reverse the decision of the California Court of Appeal.

Respectfully submitted,

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No. 88-1095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH HOWE and DORIS LOUISE HOWE,

Appellants,

vs.

NORCHEK OF NEWPORT, INC., d/b/a WOODY'S WHARF; ROBERT KINNEY,

Appellees.

APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT, DIVISION THREE

AMICUS CURIAE BRIEF BY MOTHERS AGAINST DRUNK DRIVING IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-1099

JOSEPH HOWE and DORIS LOUISE HOWE,
Appellants,

v.

NORCHEK OF NEWPORT, INC. d/b/a WOODY'S WHARF; ROBERT KINNEY,
Appellees.

ON APPEAL FROM THE COURT OF APPEAL
OF
CALIFORNIA

AMICUS CURIAE BRIEF BY MOTHERS AGAINST DRUNK DRIVING IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

Mothers Against Drunk Driving, with the consent of both parties and at the

request of appellants, respectfully submits the following brief in support of appellants' jurisdictional statement.

STATEMENT OF INTEREST

More than 46,000 people die in vehicular crashes each year. National Highway Traffic Administration, Fatal Accident Reporting System 1987, A Review of Information on Fatal Traffic Accidents in the U.S. in 1987 (1988). Alcohol is involved in more than half these deaths: fifty-one percent of all fatalities involve alcohol, with forty percent involving blood alcohol levels of 10% or above, the most common standard for legal intoxication. In addition, over 560,000 injuries annually result from alcohol-related traffic crashes. Id.

In response to the unrelenting toll that drunk driving exacts from this country, day after day, month after month, year after year, Mothers Against Drunk Driving (MADD), a nationwide, non-profit organization, was formed in May, 1980. MADD's mission is to mobilize victims of drunk driving crashes and their allies to establish the public conviction that drunk driving is unacceptable and criminal, in order to promote corresponding public policies, programs, and personal accountability. MADD has now grown to approximately 400 chapters throughout the United States with more than 1,000,000 members and supporters.

MADD provides educational programs to the community, especially to teenagers, concerning the effects of

alcohol and driving; provides emotional support and criminal justice advocacy to victims of crashes; encourages programs on responsible business practices for commercial servers of alcohol; and testifies before state legislatures and Congress with respect to alcohol-impaired driving issues. MADD has been a key instigator in passing over 900 highway safety and alcohol-related laws across the United States. Thus, MADD has had considerable experience with the subject matter of Howe v. Norchek, civil liability of commercial servers of alcohol.

Given the enormity and severity of the drunk driving problem in this country, MADD believes this case is critical. Coherent policies must be

implemented to reduce alcohol-related death and injuries, and Howe v. Norchek concerns one of the most constructive solutions, commercial server civil liability.

ARGUMENT

Drunk driving is the most frequently committed crime in the nation today. U.S. Dept of Jus., Bur. of Just. Stat., Report to the Nation on Crime and Justice (March 1988). It kills people, it maims people, it injures people for life. The toll is heaviest upon the young: Traffic crashes are the number one cause of death and serious injury for those under twenty-five years of age; young people constitute approximately thirty-eight percent of the total 23,630 annual drunk driving deaths. National

Highway Traffic Administration, Fatal Accident Reporting System 1987, A Review of Fatal Traffic Accidents in the U.S. in 1987 (1988). Nine teenagers die, and hundreds of others are injured, every day due to drunk driving.

Appellants' son, Joseph Brandon Howe ("Joey"), was one of those young people. Joey was a normal, fun-loving and hard-working 20-year old in March of 1985, when a pick-up truck driven by Stephen Chase, hit him. Joey, riding his bicycle home from work, was killed. His parents, appellants, were devastated.

Chase had been drinking heavily that evening. Appellees, a bar at Newport Beach and a bartender at that bar, had served Chase substantial quantities of

alcohol even though Chase was obviously intoxicated when he entered the bar. Immediately prior to being served by appellees, Chase had been refused service at two other bars and ejected from a third. While Chase was drinking at appellees, Chase fell off the bar stool. Appellees continued to serve drinks to Chase even though they knew that Chase was so drunk he was not in responsible command of his own conduct. Appellees also knew that Chase would drive home from the bar. Despite the knowledge that Chase was intoxicated, that he was not in command of his own conduct, and that he would drive home, appellees continued to serve drinks to Chase solely for their monetary gain, without regard for the safety of the driving public.

This case, therefore, is critical in the development of coherent and effective public health and safety policies to reduce alcohol-related deaths and severe injuries. Howe v. Norchek focuses upon one method of decreasing the carnage wrought by drunk driving: encouraging commercial servers of alcohol to "turn off the tap" to potential drunk drivers by imposing civil liability upon them for illegally serving alcoholic beverages to persons who are obviously intoxicated.[1] This approach is well in keeping with ordinary principles of negligence and legal liability that

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[1] Every state prohibits the sale of alcohol to obviously intoxicated persons. J. Mosher, I Liquor Liability Law §1.04 [2][B] at 1-18 (Matthew Bender 1987).

apply to other businesses in our society.

Based upon its experience in this area, MADD believes that commercial servers should, at the very least, be held liable to victims such as Joey and his parents for damages that result from the servers' illegal service of alcoholic beverages to those who are obviously intoxicated. This principle has been repeatedly recognized in recent court cases throughout the country and, appropriately applied, would serve as an effective deterrent to irresponsible service of alcoholic beverages, thereby greatly reducing the risk of drunk driving, while recognizing the rights of victims against such irresponsibility.

This case is crucial because it is before this Court on appeal, not on certiorari. Thus, this Court's ruling, even if merely a one sentence summary reversal or affirmance, will be definitive in all cases questioning the constitutionality of immunizing commercial servers from liability for their illegal service of alcoholic beverages to obviously intoxicated persons. Before taking such a fateful step, MADD implores this Court to consider the tragedy of drunk driving in this country and need for measures such as commercial servers liability, both as a safety measure and as a public health approach to the problem.

This case provides a text book example of the desirability of server liability as an incentive to encourage

responsible practices. Here, Chase, the drunken driver, evidently could not control whether or not he continued to drink. While he must be held accountable for his actions, those who provided the drinks bear responsibility for the results of his intoxication as well. If Chase was to have been stopped from drinking (and driving), the commercial servers -- the persons pouring the drinks -- would have to have exerted control. Insulated from liability, as commercial servers are under the statutes questioned by appellants, appellees had no reason to stop serving drinks to an obviously intoxicated individual. Their only incentive was the economic profit of continued drink sales to Chase.

Chase is not an isolated example. Studies indicate that most drunk drivers become intoxicated in places other than their own homes. Two roadside breath tests reported that approximately forty percent of those stopped who had blood alcohol levels of .10% or above were driving from bars or taverns. Damkot, Alcohol Incidence in Rural Drivers: Characteristics of a Population and Clues for Countermeasures, 9 Drug & Alcohol Dependence 305, 322 (1982); Wolfe, 1973 U.S. National Roadside Breath Taking Survey, 4 Hit Lab Rep. 73 (Highway Safety Research Institute, Univ. of Mich. 1974). An even greater percentage of those arrested than those convicted of driving under the influence had come from bars or

taverns. J. Mosher & L. Wallack, The DUI Project: Description of an Experimental Program to Address Drunk Driving Problems 47 (1979); Ryan & Segers, San Diego County's First Conviction Program Population Description 13 (1983). Studies also indicate that people who drink before driving often do so at sports events, airports, and large discos where alcohol is served. Id.

Since commercial servers of alcohol are the most common source of alcohol for impaired drivers, they are, likewise, in the best position to prevent intoxicated persons from causing harm to innocent victims. The commercial seller is the last person who can insure that the potential drunk driver does not become an actual drunk

driver by refusing to sell to him or her. Server training programs are offered by numerous training organizations. In addition, establishments can also support "designated driver" programs and offer free taxi rides for their patrons. If commercial servers and their insurers have an economic incentive to do so, bartenders can and will monitor the sobriety of patrons more carefully.

Solutions that only look to one-half of the supply and demand system cannot be effective. If persons who drive while drunk are to be held responsible, so must commercial servers who irresponsibly sell alcohol.[2] Fairness

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[2] A perverse twist of California's statutory system establishes a truly unjustifiable treatment of victims. Had Joey, a

(continued...)

dictates that the commercial server, who benefits economically from every sale of alcohol, should also bear the burden which accompanies that benefit.

Criminal liability for serving obviously intoxicated persons is not enough. Although 22,000 establishments dispensed alcoholic beverages in California during 1974 and 1975, the California Department of Alcoholic Beverage Control filed only a total of 582 accusations over those two years for violation of serving obviously

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[2](...continued)
minor, been served the drinks, become drunk, been involved in a car accident, and died, appellees would be liable. See Chalup v. Aspen Mine Co., 175 Cal. App. 3d 973, 221 Cal. Rptr. 97 (1985) (commercial servers may be liable to minors for serving them alcohol.) But because Joey was a truly innocent and sober victim, California allows appellees to evade their responsibility.

intoxicated patrons. Kindt v. Kaufman, 57 Cal. App. 3d 845, 873 n.10, 129 Cal. Rptr. 603 (1976). Obviously, large additional expenditures of people, money and time are needed if states are expected to police all of this country's bars. Moreover, criminal liability threatens only (however mildly) the individual bartender. It does not encourage the owners of the bar or drinking establishment to adopt policies concerning responsible serving procedures and to ensure they are followed. On the other hand, if civil liability is allowed to supplement criminal liability, it will encourage saloon keeper responsibility without requiring additional bureaucratic mechanisms or further burdens to the taxpayer.

Had civil liability for commercial servers existed in March 1985, it is possible that appellees would have acted responsibly and legally, and chosen not to serve alcoholic drinks to an obviously drunk man, who they knew would drive home from the bar.

Instead they would have "turned off the tap." If that had happened, perhaps Joey would be alive today.

CONCLUSION

In light of the serious and nationwide threat posed by drunken driving and the importance of commercial server liability as a means of combating this threat, amicus curiae Mothers Against Drunk Driving requests that this Court note probable jurisdiction of the appeal of this case or, in the alternative, reverse the

decision of the California Court of Appeal.

Respectfully submitted,

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